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No. 90-1194

In The

Supreme Court of the United States

October Term, 1990

MAINE PUBLIC UTILITIES COMMISSION,

Petitioner,

v.

MAINE YANKEE ATOMIC POWER CO.,

Respondent.

Petition For Writ Of Certiorari To The Supreme Judicial Court Of Maine

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I. QUESTIONS PRESENTED

Respondent Maine Yankee Atomic Power Co. ("Respondent" or "Maine Yankee") disagrees with Petitioner's statement of the question presented and submits that the issues raised by this case are as follows:

A. Whether the Supreme Judicial Court of Maine properly found the State preempted from altering the decommissioning funding expense fixed by the Federal Energy Regulatory Commission ("FERC") for an operating nuclear utility that sells its electricity exclusively at wholesale in interstate commerce.

B. Whether the Supreme Judicial Court of Maine properly found that the future decommissioning of an operating nuclear plant that sells its electricity exclusively at wholesale in interstate commerce is a matter which has been pervasively and exclusively regulated by Congress.

C. Whether Petitioner's order challenging the exclusive jurisdiction of FERC to fix Maine Yankee's decommissioning funding expense is a collateral attack on a final, unappealed order of FERC, as prohibited by 16 U.S.C. § 825*l*(b).

II. RULE 29.1 STATEMENT

Maine Yankee has no subsidiaries. It is owned by ten investor-owned utilities, none of which owns fifty percent or more of Maine Yankee's voting stock.[1]

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[1] The utilities are Central Maine Power Company, New England Power Company, Connecticut Light and Power Company, Bangor Hydro-Electric Company, Maine Public Service Company, Public Service Company of New Hampshire, Cambridge Electric Light Company, Montaup Electric Company, Western Massachusetts Electric Company, and Central Vermont Public Service Corporation.

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IV. CONSTITUTIONAL AND STATUTORY PROVISIONS

Pertinent provisions of the United States Constitution; the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011 *et seq.* (1989), the Energy Reorganization Act of 1974, 42 U.S.C. §§ 5801 *et seq.* (1989), and regulations governing decommissioning promulgated thereunder by the Nuclear Regulatory Commission, 10 C.F.R. Part 50 (1990), the Federal Power Act, 16 U.S.C. §§ 791a *et seq.* (1989) and I.R.C. § 468A (1989) are reprinted in Respondent's

Appendix ("App.") at App. 1-40. The Maine Nuclear Decommissioning Financing Act, Me. Rev. Stat. Ann. tit. 35-A ("35-A M.R.S.A."), §§ 4351-4359 (1989) is reprinted in Petitioner's Appendix ("Pet. App.") at Pet. App. 94-117.

V. STATEMENT OF THE CASE

A. Federal Oversight of Maine Yankee's Decommissioning.

Maine Yankee is a single-asset company which owns and operates a nuclear electric generating facility licensed by the Nuclear Regulatory Commission ("NRC") and located at Wiscasset, Maine. *Maine Yankee Atomic Power Co. v. Maine Pub. Util. Comm'n*, 581 A.2d 799, 800 (Me. 1990), App. 58-73. Maine Yankee is owned by ten investor-owned electric utilities ("the Sponsors") located in Maine, Massachusetts, New Hampshire, Connecticut and Vermont. *Id.* It sells to these Sponsors, at wholesale, its entire output of electricity on a basis proportional to each Sponsor's ownership of the company. *Id.*[2]

Because it is an operating, NRC-licensed nuclear utility, the decommissioning of Maine Yankee's plant is subject to NRC jurisdiction. *See* 10 C.F.R. § 50.75 (1990), App. 26-32. The NRC has promulgated comprehensive regulations for decommissioning nuclear facilities which govern, inter alia, the alternative technical methods of

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[2] Several of Maine Yankee's Sponsors have, in turn, assigned some percentage of their power entitlements to consumer-owned municipal utilities located throughout New England. *See Maine Yankee Atomic Power Co.*, 42 F.E.R.C. ¶61,307 (1988).

decommissioning, and the financing and funding for decommissioning. 53 Fed. Reg. 24018-27, 24039 (1988).

In doing so, the NRC has established minimum decommissioning funding levels as a means to assure that adequate funds are available for safe and timely decommissioning. *Id.* at 24037. The NRC has acknowledged, however, that "[f]unding for decommissioning is also subject to the regulation of agencies (e.g., Federal Energy Regulatory Commission (FERC) and State Public Utility Commissions) having jurisdiction over rate regulation." 10 C.F.R. § 50.75(a), App. 26. It has accordingly tailored its jurisdiction to accommodate site-specific decommissioning cost variations that might be taken into account by a rate-setting agency in setting rates for a utility. Thus, the NRC regulations recognize

> that funding for decommissioning of electric utilities is also subject to the regulation of agencies having jurisdiction over rates, and that the NRC requirements are in addition to, and not substitution for other requirements, and are not intended to be used by themselves by other agencies to establish rates. Hence, NRC will not become involved in the rate regulation process as it relates to decommissioning.

53 Fed. Reg. at 24031. In a similar vein, the NRC states that " . . . issues normally outside NRC's jurisdiction such as rate of collection and whether a funding method is equitable should be considered by utilities and their ratemaking bodies." *Id.*

As an exclusively wholesale seller of electricity, Maine Yankee's rates and terms of service are subject to regulation only by FERC. 16 U.S.C. §§ 824, 824e (1989), App. 1-7. Pursuant to the Federal Power Act ("FPA"),

FERC has exclusive jurisdiction over Maine Yankee's accounting, rates of depreciation and over the establishment of the cost of service for setting rates. 16 U.S.C. §§ 824e, 825, 825a, App. 4-11. Included in Maine Yankee's FERC-set rates are cost of service, including provision for return through depreciation of the utility's investment in its plant, rate of return on investment in common equity and allowance for future expense in decommissioning. *See Maine Yankee*, 581 A.2d at 803, App. 66. These three elements of Maine Yankee's filed rate are "stated" components of the rate. *Id.* They are specifically fixed by FERC and are subject to change only with prior FERC approval after notice and opportunity for hearing pursuant to 18 C.F.R. Part 35 (1990).

FERC's authority over wholesale utilities also extends to the establishment of and regulation of collections for decommissioning trust funds. *See Systems Energy Resources, Inc.*, 37 F.E.R.C. ¶61,261 (1986). In exercising this part of its jurisdiction, FERC has enunciated general guidelines, to which the industry is held, for the operation and administration of decommissioning trust funds. *Id.* at 61,727-28.[3]

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[3] FERC requires, inter alia, that each utility request a ruling from the Internal Revenue Service ("IRS") under Internal Revenue Code ("IRC") § 468A, App. 15-20. *Id.* at 61,727. Section 468A, in turn, provides that a nuclear utility may take a current tax deduction in a "ruling amount" which is approved by the IRS and which is based on the yearly decommissioning funding level established by the utility's ratemaker as a cost of service for ratemaking purposes. Treas. Reg. § 1.468A-3(a), (g)

(Continued on following page)

In 1981, 1985 and 1988, Maine Yankee filed with FERC seeking approval of the funding of the estimated cost of decommissioning and inclusion of decommissioning expense, at levels fixed by FERC, in its wholesale rates. In all three FERC rate proceedings, Maine Yankee and the parties to the FERC proceedings, including the Maine Public Utilities Commission ("MPUC" or "Petitioner"), the Maine Public Advocate and representatives of Maine Yankee's wholesale municipal customers located outside of Maine, have participated in litigated proceedings at FERC. *See Maine Yankee Atomic Power Co.*, 20 F.E.R.C. ¶61,141 (1982); *Maine Yankee Atomic Power Co.*, 31 F.E.R.C. ¶61,068 (1985); *Maine Yankee Atomic Power Co.*, 44 F.E.R.C. ¶61,368 (1988), App. 47-52. Each time, the issues of Maine Yankee's rate of return, decommissioning cost estimate and funding level for decommissioning expense were negotiated by the parties and fixed in binding, FERC-approved settlements. *Maine Yankee*, 581 A.2d at 801, App. 61. In the 1988 FERC rate proceeding, the parties negotiated, and FERC approved, a settlement which fixed Maine Yankee's decommissioning expense at $167,000,000 and the annual funding level at a rate of $9,073,943 per year. *Id.* at 802, App. 62-63. *See also Maine Yankee Atomic Power Co.*, 44 F.E.R.C. ¶61,368, Settlement Agreement, App. 47-57. The settlement also fixed Maine Yankee's rate of return on common equity at 12.9 percent.

(Continued from previous page)

(1990). Thus, in the case of a FERC-regulated utility such as Maine Yankee, the IRC provision relies, in allowing deductions, on FERC determinations setting decommissioning expense and inclusion of these amounts in rates.

Id.[4] The MPUC, a full party to the proceeding, did not object to the settlement pursuant to 18 C.F.R. § 385.602(f)(3) (1990) (thus waiving all objections thereto) and took no appeal from FERC's order approving it. *Maine Yankee*, 581 A.2d at 801, App. 61.

B. Attempted State Oversight of Maine Yankee's Decommissioning.

In 1982, Maine enacted the Nuclear Decommissioning Financing Act ("NDFA"). The purpose of the NDFA, as expressed by the Maine legislature and as confirmed by the Supreme Judicial Court of Maine, is to protect the public health and safety from the radiological hazards posed by inadequate decommissioning. *Id.* at 806, App. 72; 35-A M.R.S.A. § 4351(1), Pet. App. 94. The NDFA requires any nuclear utility operating within Maine to establish a decommissioning trust fund and to submit to the MPUC a decommissioning financing plan and technical decommissioning plan. 35-A M.R.S.A. § 4353, Pet. App. 99-107. The Act establishes criteria by which the MPUC is to review and approve these plans for the purpose of, inter alia, fixing a decommissioning cost estimate, and requires utilities to fund for decommissioning at the level necessary to reach the MPUC estimate. *Id.*

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[4] The FERC-approved settlement also included a "stay-out" provision prohibiting Maine Yankee from seeking an increase in the estimated decommissioning costs to be effective before February 16, 1991. *Maine Yankee*, 581 A.2d at 802, App. 63. This bar applied only to Maine Yankee and the other parties to the FERC proceeding may petition FERC at any time for an increase in decommissioning expense. *See* Settlement Agreement, App. 55.

On March 20, 1989, Maine Yankee moved that the MPUC approve a decommissioning financing plan which reflected the provisions of the 1988 FERC order. *Maine Yankee*, 581 A.2d at 802, App. 63. After hearing and full briefing by the parties, the MPUC, on February 22, 1990, rejected the FERC-approved decommissioning expense of $167,000,000 and substituted its own expense of $178,097,900 (the "MPUC Order"). MPUC Order, Pet. App. 75. The MPUC further ordered that Maine Yankee increase, effective March 1, 1990, its annual funding level by $719,961, for a total annual contribution of $9,793,904. *Id.*, Pet. App. 81. Correctly recognizing that it could not require a FERC-regulated utility to collect this additional charge in rates, the MPUC ordered that the additional contribution be supplied from the assets of Maine Yankee or its Sponsors.[5] MPUC Order Granting Request for Stay, App. 41-46. Thus, the effect of the MPUC Order was to require Maine Yankee to fund for decommissioning at a level higher than it could collect in its wholesale rates (especially given the "stay-out" provision in the 1988 FERC settlement)[6] or currently deduct under IRC Section

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[5] The MPUC entered its orders on the understanding that it enjoyed concurrent jurisdiction with FERC over Maine Yankee's decommissioning expense and funding levels. MPUC Order, Pet. App. 55-56. Only on appeal to the Supreme Judicial Court of Maine did Petitioner assume its present position (*See Petition* at 11-15) that FERC possesses no valid jurisdiction over Maine Yankee's decommissioning funding.

[6] The Supreme Judicial Court of Maine found that the effect of the "stay-out" provision (*see* note 4, *supra*), when combined with FERC's requirement "that decommissioning costs come from ratepayers," was to render compliance with both the MPUC Order and FERC's 1988 rate order "impossible." *Maine Yankee*, 581 A.2d at 804, App. 67.

468A, and to extract the difference between the MPUC and FERC-set funding levels from the company's assets, thereby lowering its rate of return.

Maine Yankee appealed the MPUC Order to the Supreme Judicial Court of Maine. In a unanimous decision issued on October 25, 1990, the Maine court held the MPUC Order and the NDFA preempted under the Supremacy Clause of the United States Constitution on two independent grounds. First, it found that the MPUC Order interfered impermissibly with the 1988 FERC rate order fixing Maine Yankee's decommissioning expense above NRC minimum levels. *Id.* at 803-805, App. 66-69. Second, the court found that the NDFA was directed at the regulation of nuclear health and safety concerns, and thus concluded that the combined jurisdiction of the NRC over nuclear health and safety and FERC over decommissioning funding above NRC levels completely foreclosed the State from regulating the decommissioning of Maine Yankee's plant. *Id.* at 805-806, App. 69-72. The MPUC's petition for certiorari followed.

VI. SUMMARY OF ARGUMENT

Petitioner attempts to characterize the present case as one raising significant, novel issues concerning the division of regulatory authority between the state and federal governments. To the contrary, this case calls into play only the familiar principle – repeatedly affirmed by this and other courts – that the states must respect the determinations of FERC regulating the cost of power sold at wholesale in interstate commerce or must challenge those

determinations in the appropriate federal forum. *See Mississippi Power & Light Co. v. Moore*, 487 U.S. 354 (1988); *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986). Petitioner has disregarded this principle and has sought, in collateral state proceedings, to alter the stated components of Maine Yankee's FERC-approved filed rate. This attempted venture into exclusively federal regulatory terrain, which was held preempted in a unanimous decision by Maine's highest court, finds no support in the cases and presents no important issue of law that has not been decided by this Court.

Nor is Petitioner able to generate an important question of federal law by arguing that *Pacific Gas & Electric Co. v. State Energy Resources Comm'n*, 461 U.S. 190 (1983) ("Pacific Gas"), which affirmed the NRC's plenary jurisdiction over nuclear health and safety matters and nuclear plant operation, permits the State to regulate the decommissioning of an operating nuclear utility pursuant to a statute that the State's highest court found motivated by nuclear safety concerns. *Pacific Gas* recognized that NRC jurisdiction coexists with the authority of FERC and the states over wholesale and retail power sales respectively. The federal regulatory scheme reflects this allocation of authority by providing that the entire spectrum of decommissioning actions is regulated by the NRC, with the limited exception that site-specific cost variations, collection rates and rate equity considerations relating to funding continue to be subject to regulation by the ratemaking agency with jurisdiction over the particular utility's rates and terms of service. In the case of Maine Yankee, that agency is exclusively FERC.

VII. ARGUMENT

A. THE HOLDING OF THE SUPREME JUDICIAL COURT OF MAINE CREATES NO CONFLICT WITH THE DECISIONS OF THE STATE AND/OR FEDERAL COURTS AND PRESENTS NO IMPORTANT QUESTION OF FEDERAL LAW.

This Court has stated that it will review a case on certiorari to secure uniformity of decision between the courts and "to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort." *Magnum Import Co. v. Coty*, 262 U.S. 159, 163 (1923).

Petitioner is unable to cite to any judicial decision, state or federal, conflicting with the Maine court's holding that the state lacks authority to set the decommissioning funding levels of an exclusively wholesale seller of nuclear-generated power.[7] Accordingly, Petitioner is obliged to make the meritless argument that the instant case presents a legal issue of "national importance." *Petition* at 5.

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[7] Nor is Respondent aware of any such conflicting judicial decision. Indeed, the cases show remarkable consistency in their defense of the preeminent authority of FERC over the economic aspects of wholesale, interstate power sales, and of the NRC over the safety and "nuclear" aspects of energy generation. *See infra* at 16-20 (citing FERC cases), 20-23 (citing Atomic Energy Act cases). Petitioner's claim of conflict between the Maine court's decision and the holding in *Pacific Gas*, 461 U.S. 190, is first addressed by Petitioner in its argument on the merits of the Maine decision and is thus answered in a corresponding section herein. *See infra* at 20-24.

The essential shortcoming in Petitioner's argument is that it confuses the importance of adequate decommissioning with the importance of the legal question which this Court is now called upon to address. Undoubtedly, as Petitioner observes, adequate and timely decommissioning is essential to the public well-being. *See Petition* at 5-6; 53 Fed. Reg. at 24019. The holding of the Maine court serves only to promote this end, however, by enforcing the extensive federal regulation which is designed to assure that nuclear decommissioning will be adequately funded and safely and thoroughly accomplished. *See* 53 Fed. Reg. at 24019 (stating purpose of NRC amendments to assure that decommissioning will be carried out "with minimal impact on public and occupational health and safety and the environment"); *Boston Edison Co.*, 34 F.E.R.C. ¶63,023 at 65,076 (1986) (expressing FERC's commitment to ensuring adequacy of decommissioning funding levels). The federal scheme of regulation accomplishes its goal through a logical allocation of authority between the federal and state governments: The NRC sets minimum decommissioning funding levels and the ratemaking agency with jurisdiction over the utility's rates supplements those levels according to site-specific studies. 53 Fed. Reg. at 24031, 24038.[8] That funding above

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[8] The Low Level Radioactive Waste Policy Act (discussed in *Petition* at 8-9), which neither removes authority over decommissioning of exclusively wholesale power sellers from the federal government nor grants such authority to the states, has no bearing on the decision of the legal issues presented by this case. *See* 42 U.S.C. § 2021d (1990).

NRC levels can be effectively regulated only by a utility's ratemaking agency is evident from the fact that only such an agency is able to ensure the equitable collection of decommissioning expense from ratepayers in a way that will not otherwise threaten the financial integrity of the utility. In the case of a wholesale, interstate seller of power, the regulating rate agency will be FERC; for a retail, intrastate power seller, it will be the state PUC. *Id.*

This regulatory system, as structured by Congress and as interpreted by the Maine court, leaves no room for a claim of state/federal regulatory conflict. Nevertheless, Petitioner contends that a "*potential* [federal/state or multistate] conflict exists whenever ratemaking jurisdiction over a nuclear power plant is vested in agencies beyond the borders of the state where the plant is located." *Petition* at 5 n.2 (emphasis added). Two answers may be made to this contention.

First, whether or not a "potential" for conflict exists in cases involving the decommissioning of utilities whose economic activities are subject to the jurisdiction of agencies other than FERC, those cases are not before the Court.[9] *See United States v. Raines*, 362 U.S. 17, 22 (1960)

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[9] Petitioner points to the Seabrook plant located in New Hampshire as a potential breeding ground of multistate or federal/state regulatory conflict. *Petition* at 5 n.2. There has been no conflict to date, however, and even if there had, it would have no relevance here. This is so because Seabrook, unlike Maine Yankee, does not sell its power exclusively at wholesale. *See id.* Similarly, although Petitioner is able to show (*Petition* at 8) that other states have enacted legislation

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(U.S. Supreme Court will not decide constitutional question on hypothetical facts.) The present appeal involves only the decommissioning of an exclusively FERC-regulated utility,[10] and, as the state court found below, the federal law applicable to such a utility offers no plausible opportunity for federal/state regulatory conflict. *Maine Yankee*, 581 A.2d at 805, App. 71.

Second, Petitioner's claim of conflict simply begs the question of the validity of state jurisdiction over the decommissioning funding of an exclusively interstate, wholesale power seller. The sole reason for the purported conflict here is that Petitioner has interfered with exclusive federal jurisdiction by attempting to regulate the rate components of a utility that sells its power exclusively at wholesale in interstate commerce. It has done this despite the fact that FERC has fixed Maine Yankee's decommissioning funding levels as a stated rate component and despite the NRC's instruction that minimum funding levels are to be supplemented only by the agency with ratemaking jurisdiction over the particular utility. The Supreme Judicial Court of Maine has rejected Petitioner's claim of regulatory authority, however, and in asserting the supremacy of federal law has revealed the purported conflict here to be illusory.

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concerning decommissioning financing, it offers no evidence that these states have attempted, like Petitioner, to fix the decommissioning funding levels of utilities that sell their power only at wholesale in interstate commerce.

[10] Research has revealed that there are only four operating nuclear utilities other than Maine Yankee whose rates and terms of service are governed exclusively by FERC.

Thus, the instant case presents no important legal question that is likely to recur or to trouble other courts. The applicable federal law provides a clear and principled system of regulation for the decommissioning of nuclear plants whose rates are set by FERC. The system's operation is not difficult to comprehend and, indeed, tracks well-established jurisdictional lines, with states maintaining the authority to fix the supplementary decommissioning funding levels of retail sellers of electricity, and with FERC performing the same function for wholesale sellers of electricity. *See Pacific Gas*, 461 U.S. at 205-206 (reciting general rule that wholesale, interstate power sales are within exclusive federal regulation while local retail sales may be subject to state control). This is not a case in which a state agency has ventured into a jurisdictional no-man's-land to regulate a matter on legal grounds which a court of law might reasonably find defensible. It is instead the instance of a single state PUC overreaching and interfering with the filed rate of a FERC-regulated utility, a practice which the Maine court, following an unbroken line of this Court's decisions, properly forbade. *See Nantahala Power & Light Co.*, 476 U.S. at 965-67, and citations therein. Accordingly, the petition for certiorari should be denied.

B. THE SUPREME JUDICIAL COURT OF MAINE CONCLUDED CORRECTLY THAT THE MPUC ORDER AND THE NDFA ARE PREEMPTED AS APPLIED TO A UTILITY THAT SELLS ITS POWER EXCLUSIVELY AT WHOLESALE IN INTERSTATE COMMERCE.

1. The MPUC Order and NDFA, as Applied to a Utility That Sells Its Power Exclusively at Wholesale, Are Preempted by the FPA.

In a unanimous decision, the Supreme Judicial Court of Maine held the MPUC Order and NDFA preempted as applied to Maine Yankee on the grounds that the Maine Act interfered impermissibly with FERC's jurisdiction over wholesale utilities' rates and services. *Maine Yankee*, 581 A.2d at 805, App. 69. That ruling is strictly consonant with the principles of applicable law, and requires neither correction nor review by this Court.[11]

As recognized by the state court, the source of FERC jurisdiction over a utility's decommissioning expense is its statutory authority over the depreciation expense, terms and conditions of service, and sales rates of wholesale, interstate sellers of electricity. *Id.* at 803-04, App. 66-67.[12] The FPA

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[11] In addition, Petitioner's challenge to this aspect of the Maine court's decision is premised on a belated denial of FERC's jurisdiction to enter the 1988 rate order. *See Petition* at 12-13. It thus constitutes an impermissible collateral attack on the FERC order. *See infra* at 25-28.

[12] As stated, *supra*, Petitioner issued the MPUC Order under the impression that, while FERC possessed jurisdiction over Maine Yankee's decommissioning funding levels, the

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grants FERC jurisdiction over rates and terms of service for " 'the transmission and sale (wholesale) of electricity by investor-owned utilities in interstate commerce' ". *Id.* at 803, App. 66 (*quoting* 53 Fed. Reg. at 24037-38). In addition, the Federal Power Act provides that FERC shall fix certain of the costs of production incurred by a utility in providing the service for which the rates are being set (16 U.S.C. § 824e, App. 4-7) and shall possess authority to set the rates of depreciation of the property of utilities within its jurisdiction (16 U.S.C. § 825a, App. 10-11). Decommissioning expense is a substantial cost of service which, as a form of depreciation, is amortized and collected from ratepayers at FERC-fixed levels over the useful life of the plant, and which has thus been properly categorized as a stated rate component within FERC's exclusive control. *Maine Yankee*, 581 A.2d at 803-804, App. 66-67.[13] In Maine Yankee's case, FERC has acted to

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State possessed "independent" jurisdiction over the same subject. It is, however, "common ground" that concurrent jurisdiction is an impossibility under the FPA. *Mississippi Power & Light Co.*, 487 U.S. at 377 (Scalia, J., concurring). *See also California v. FERC*, 110 S. Ct. 2024, 2031 (1990) (FPA does not provide for system of futile duplication of two authorities over the same subject matter); *Public Util. Comm'n of Cal. v. FERC*, 900 F.2d 269, 274 (D.C. Cir. 1990) (citing cases supporting proposition that where FERC jurisdiction applies, it is exclusive).

[13] FERC originally characterized decommissioning expense as depreciation and treated it accordingly for accounting purposes. *Middle South Services, Inc.*, 33 F.E.R.C. ¶61,094 at 61,198 (1985). In more recent years, and out of a growing

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approve a particular decommissioning funding level as a fixed component of the company's wholesale rate schedule. *See id.* at 802, App. 62.

Because decommissioning expense is a stated component of Maine Yankee's utility rate, the State may not alter that fixed expense without violating the "filed rate doctrine." As the Maine court summarized:

> Under the "filed rate doctrine" developed under federal law, a federally regulated utility is precluded from collecting any rate other than that on file with the Commission, and the MPUC cannot interfere with the rate set by FERC or the components that go into it.

Id. at 804, App. 67.

The filed rate doctrine was first enunciated, and has been repeatedly affirmed, in the decisions of this Court. *See, e.g., Montana-Dakota Util. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 251 (1951); *Arkansas-Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577-78 (1981).[14] This Court has recognized that the doctrine not only governs the rate which may be charged or received for wholesale electrical

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concern for the magnitude of the costs involved, FERC has isolated decommissioning expense as a rate component separate from other depreciation and has required that it be separately stated, collected and maintained. *Boston Edison Co.*, 52 F.E.R.C. ¶61,010 at 61,074-77 (1990).

[14] The Court has stated that the provisions of the FPA and Natural Gas Act are in all material respects substantially similar. *Arkansas-Louisiana Gas Co.*, 453 U.S. at 577 n.7. Accordingly, no distinction is made herein between cases arising under one or the other of the two acts.

power, but protects the economic determinations made by FERC in the context of rate regulation from being denied full effect by the states. *See Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988) (striking down state law regulating financing decisions already considered by FERC in the exercise of its authority over gas rates and facilities); *Nantahala Power & Light Co.*, 476 U.S. 953 (requiring state to accept FERC-approved wholesale power allocations); *Mississippi Power & Light Co.*, 487 U.S. 354 (rejecting state challenge to validity of FERC-approved cost allocations).

State and lower federal courts have joined this Court in enforcing FERC's plenary authority and have ruled that the states must recognize FERC rate determinations as final and binding and may impose no obligations on a utility that frustrate the objectives of FERC regulation.[15]

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[15] *See, e.g., Public Utilities Comm'n of State of Cal. v. FERC*, 900 F.2d 269 (D.C. Cir. 1990) (rejecting state claim of concurrent jurisdiction with FERC over portions of gas pipeline); *National Fuel Gas Supply Corp. v. Public Serv. Comm'n*, 894 F.2d 571 (2nd Cir.), *cert. denied*, 110 S. Ct. 3240 (1990) (state may not undermine FERC determinations through duplicative or inconsistent regulation); *Kentucky-West Virginia Gas Co. v. Pennsylvania Pub. Util. Comm'n*, 837 F.2d 600 (3rd Cir.), *cert. denied*, 488 U.S. 941 (1988) (state must recognize FERC-approved costs of service as a valid operating expense for retail rate-making purposes); *accord Arkansas Power & Light Co. v. Missouri Public Serv. Comm'n*, 829 F.2d 1444 (8th Cir. 1987); *Appalachian Power Co. v. Public Serv. Comm'n*, 812 F.2d 898 (4th Cir. 1987) (rejecting state challenge to FERC-approved wholesale power cost allocation agreement); *Northern States Power Co. v. Minnesota Pub. Util. Comm'n of W. Va.*, 344 N.W.2d 374 (Minn.), *cert. denied*, 467 U.S.

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The ruling of the Maine court is in perfect agreement with these cases. By attempting to fix Maine Yankee's decommissioning expense, the MPUC sought to alter a "cost of service component that contributes to the establishment of Maine Yankee's utility rate." *Maine Yankee*, 581 A.2d at 804, App. 66-67.[16] By requiring the additional decommissioning funding to come from the assets of Maine Yankee's Sponsors, the MPUC impermissibly mandated a reduction in another of Maine Yankee's filed rate components, its rate of return, and thereby threatened to weaken the financial base of a utility whose fiscal soundness FERC's regulation is intended to protect. *Id.* This attempted frustration of "Congress' desire to give FERC

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1256 (1984) (state must recognize FERC-approved costs of service as valid operating expense for retail rate-making purposes); *accord Spence v. Smythe*, 686 P.2d 597 (Wyo. 1984); *Public Serv. Co. of Colo. v. Public Util. Comm'n*, 644 P.2d 933 (Colo. 1982); *Narragansett Elec. Co. v. Burke*, 119 R.I. 559, 381 A.2d 1358 (1977), *cert. denied*, 435 U.S. 972 (1978).

[16] Petitioner's argument that its attempted alteration of Maine Yankee's decommissioning expense is merely the imposition of a cost or tax upon a utility was addressed by the Maine court and found to be without merit. *Maine Yankee*, 581 A.2d at 804, App. 68-69. The impact of the decommissioning financing plan imposed by the MPUC, the court found, could not validly be compared to the impact of a state tax. *Id.* "State taxes," it wrote, "are not set by the federal government while Maine Yankee's decommissioning expenses are and have been set by FERC." *Id.*, App. 69. In addition, the Maine court found the NDFA to be directed at regulation of nuclear health and safety matters; a binding characterization which is plainly at odds with Petitioner's comparison of the MPUC Order to a tax.

plenary authority over interstate wholesale rates" is intolerable under the FPA. *See Nantahala Power & Light Co.*, 476 U.S. at 966. The Maine court rightly invalidated the MPUC Order, therefore, and its decision need not be reviewed by this Court.

2. The Supreme Judicial Court of Maine Correctly Applied This Court's Holding in *Pacific Gas*.

Petitioner claims that the Maine court's decision striking down the NDFA unduly restricts the states' power over the "economics" of decommissioning and so stands in conflict with the ruling in *Pacific Gas*, 461 U.S. 190. *Petition* at 15-18. Neither the Maine court's binding interpretation of the NDFA nor this Court's pronouncements respecting the limited jurisdiction of the states over nuclear utilities, however, lend any support to Petitioner's arguments.

In *Pacific Gas*, the Court stated the rule that the federal government "maintains complete control of the safety and 'nuclear' aspects of energy generation." *Pacific Gas*, 461 U.S. at 212. In the absence of an express and specific federal concession of power over the subject, therefore, the states are entirely excluded from regulating within the "field of nuclear safety concerns." *Id.* The NDFA, which is expressly directed at protecting the "public health, safety and the environment," was construed by the Supreme Judicial Court of Maine to be nuclear health and safety regulation. *Maine Yankee*, 581 A.2d at 806, App. 72. The Maine court therefore held the NDFA preempted on the grounds that " 'the object sought to be obtained' " by the state law " 'and the

character of obligations imposed by it' " revealed the same purpose as those sought by federal law. *Id.* (quoting *Schneidewind*, 485 U.S. at 300).[17]

This Court has stated that it will be bound by the construction given a state statute by the state's highest court "as though the meaning as fixed by the court had been expressed in the statute itself in specific words." *Guaranty Trust Co. v. Blodgett*, 287 U.S. 509, 513 (1933). *See also New York v. Ferber*, 458 U.S. 747, 769 n. 24 (1982) (state court construction of state statute is binding on U.S. Supreme Court); *O'Brien v. Skinner*, 414 U.S. 524, 531 (1974) ("it is not our function to construe a state statute contrary to the construction given it by the highest court of a state.") Here, Maine's highest court has found that the NDFA accomplishes what the Maine legislature expressly intended: The regulation of nuclear health and safety concerns. Accordingly, this Court is bound to reject Petitioner's claim that the NDFA is "economic" regulation which survives preemption under *Pacific Gas*.

Moreover, the only state regulatory authority recognized by *Pacific Gas* with respect to nuclear utilities lies in areas other than that which Petitioner now seeks to invade. *Pacific Gas* identified two such areas of state

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[17] This holding is, moreover, well supported by the applicable law. *Compare, e.g.*, 35-A M.R.S.A. § 4353(3)(B)(3), Pet. App. 101 (requiring that licensee provide reasonable assurance of adequacy of funds for decommissioning) *with* 10 C.F.R. § 50.75(b), App. 26 (same); 35-A M.R.S.A. § 4353(7), Pet. App. 106 (providing for review and updating of decommissioning financing plan) *with* 10 C.F.R. § 50.75(f), App. 30-31 (same); 35-A M.R.S.A. § 4355, Pet. App. 110-15 (providing for establishment of external decommissioning trust funds) *with* 10 C.F.R. § 50.75(e) (3), App. 30 (same).

authority: The first of these is the "planning for new power plants." *Id.* at 209. This includes determinations as to the "need for new power facilities," the "economic feasibility," "cost" and "reliability" of a particular power source, "land use" and "related state concerns." *Id.* at 205, 207, 208, 212. Thus, as Justice Blackmun remarked, the "threshold determination of whether to permit the construction of new nuclear plants" is for the state to make. *Id.* at 225-26 (Blackmun, J., concurring).[18] Conversely, the construction and operation of nuclear power plants and nuclear health and safety regulation are matters of exclusively federal concern. *Id. See also State ex rel. Util. Consumers Council v. Public Serv. Comm'n*, 562 S.W.2d 688, 698 (Mo.), *cert. denied*, 439 U.S. 866 (1978) ("the federal government regulates how nuclear plants will be constructed and maintained, the [s]tate . . . regulates *whether* they will be constructed") (emphasis in original); Note, *Preemption and Regulatory Efficiency in Federal Energy Statutes*, 103 Harv. L. Rev. 1306, 1322 (1990) (Atomic Energy Act designated two administrative spheres: "federal regulation of safety and state regulation of economic necessity, land use and rates").

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[18] When the Court notes that "Congress has left sufficient authority in the states to allow the development of nuclear power to be slowed or even stopped for economic reasons," (*id.* at 223), therefore, the authority to which it apparently refers is the state's ability to answer in the negative "the economic question whether a particular plant should be built." *See id.* at 207. Whether the state can validly make this preconstruction economic determination was the precise issue decided by the *Pacific Gas* Court. *Id.* at 212 ("[a]t the outset, we emphasize that the statute does not seek to regulate the construction or operation of a nuclear power plant.")

The second area remaining within state control is that pertaining to the rates and terms of service of utilities selling their power at retail. *Id.* at 205, 208, 209, 212. For wholesale, interstate power sellers, however, this aspect of power regulation, as well as the need for power transmitted in interstate commerce, is subject only to the "broad authority" of FERC. *Id.* at 206.

The NDFA is not concerned with preconstruction issues such as the need for new power plants and, even if aimed at retail rate regulation, could have no valid application to Maine Yankee, a solely wholesale utility. Thus, the NDFA is not permissible state economic regulation as contemplated or as described by this Court in *Pacific Gas*. Rather, the Maine statute, which purports to regulate the decommissioning of an operating nuclear plant, falls squarely within the bounds of exclusive and preemptive federal jurisdiction. *See id.* at 209. *See also Long Island Lighting Co. v. County of Suffolk*, 628 F. Supp. 654, 666 (E.D.N.Y. 1986) (distinguishing, pursuant to *Pacific Gas*, valid preconstruction regulation of nuclear utilities by states and localities from invalid post-construction regulation thereof); *United Nuclear Corp. v. Cannon*, 553 F. Supp. 1220, 1232 (D.R.I. 1982) (statute requiring nuclear fuel processing company to post bond for duration of twenty years to cover costs expended by state to decontaminate areas surrounding retired processing facilities held preempted by Atomic Energy Act).

Respondent's contentions notwithstanding, then, the Maine court's ruling is entirely consistent with *Pacific Gas* and with the existing federal regulatory regime. *Pacific Gas* held that the NRC possesses plenary jurisdiction over nuclear plant construction and operation and all nuclear

health and safety matters, while FERC and the states maintain exclusive authority over wholesale and retail ratemaking respectively. *Pacific Gas*, 461 U.S. at 205-06. *See also* 42 U.S.C. § 2021(c), App. 39 (establishing NRC jurisdiction over nuclear plant construction and operation); 42 U.S.C. § 2019, App. 37 (NRC jurisdiction under Atomic Energy Act coexists with FERC jurisdiction over the wholesale, interstate power sales of nuclear utilities). The federal regulation of decommissioning reflects this distribution of authority, with the NRC establishing, inter alia, minimum funding levels and guidelines for planning and accomplishing decommissioning and with FERC or the states supplementing the NRC levels with funds collected through rates within their respective rate jurisdictions. The lower court's ruling honors this jurisdictional arrangement and requires no correction by this Court.

3. The Decommissioning of an Exclusively Wholesale Seller of Power is Subject to a Pervasive and Exclusive Scheme of Federal Regulation.

In *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, this Court invalidated a Michigan law that concerned a matter not explicitly considered by FERC, namely the issuance of long term securities, because the law affected the federally-occupied field of wholesale ratemaking. The absence of express federal regulation of the subject was held to be no obstacle to preemption where an "imminent possibility" of collision existed between the state and federal law. *Schneidewind*, 485 U.S. at 310.

In the present case, the Maine court construed the NDFA as imposing on Maine Yankee obligations of the same character and purpose as the NRC's safety regulations. *Maine Yankee*, 581 A.2d at 806, App. 72. It further recognized that the only aspect of Maine Yankee's decommissioning that was left open to regulation was the funding, above the NRC's minimum levels, for decommissioning through rates; a function which, in Maine Yankee's case, had been and could be performed only by FERC. *Id.* at 805, App. 71. Under these circumstances, combined with the additional fact of the MPUC Order's *actual* interference with FERC regulation, the Maine court properly found the State foreclosed from regulation of Maine Yankee's decommissioning. *See National Fuel Gas Supply Corp.*, 894 F.2d at 579 (under *Schneidewind*, direct consideration of a particular matter by FERC is "more than enough to preempt state regulation").

C. PETITIONER CANNOT CHALLENGE FERC JURISDICTION IN THIS PROCEEDING.

In its application for certiorari, Petitioner calls into question both the jurisdiction of FERC to fix Maine Yankee's decommissioning funding levels and the validity of FERC's classification of decommissioning expense as a stated rate. *Petition* at 12-13. Petitioner's challenges are baseless on the merits. *See supra* at 15-25. Even if they otherwise merited review, however, Petitioner's objections to FERC's regulatory actions constitute a collateral attack on an unappealed, final order of FERC which should not be addressed outside the avenues explicitly provided by Congress. *See* 16 U.S.C. § 825*l*(b), App. 12-13; *Mississippi Power & Light*, 487 U.S. at 376.

Section 825*l*(b) of Title 16 of the United States Code provides that a party aggrieved by a FERC order "may obtain review of such order in the United States Court of Appeals" and that upon filing of a petition for such review, the Court of Appeals "shall have jurisdiction- . . . which . . . shall be exclusive." This Court has held that § 825*l* provides "a specific, complete and exclusive mode for judicial review" of "all issues inhering in the controversy" underlying an order of FERC. *Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 336 (1958). A state agency which seeks to modify the result of FERC's determinations, therefore, must do so exclusively through recourse to FERC and then through an appeal to the U.S. Court of Appeals. *Id.*[19] It may not collaterally challenge in other fora FERC's actual determinations or determinations which FERC could have made had the issues been placed before it. *Mississippi Power & Light*, 487 U.S. at 375. *See also Williams Natural Gas Co. v. City of Oklahoma*, 890 F.2d 255, 263 (10th Cir. 1989), *cert. denied*, 110 S. Ct. 3236 (1990) ("jurisdiction is not an issue with which FERC is unfamiliar or which it is incapable of addressing on appeal").

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[19] *See also Inter-City Gas Corp. v. Boise Cascade Corp.*, 845 F.2d 184, 188 (8th Cir. 1988) (private damages award by arbitrator held to be an impermissible collateral attack on FERC rate determination and evasion of § 825*l*); *National Fuel Gas Supply Corp. v. FERC*, 811 F.2d 1563, 1566 (D.C. Cir.), *cert. denied*, 484 U.S. 869 (1987) (if party wished to contest FERC's position on a particular issue, "it could have done so before the Commission, and, if it did not get satisfaction there, could have brought its contentions before the courts"); *Safe Harbor Water Power Corp. v. Federal Power Comm'n*, 124 F.2d 800, 804 (3rd Cir.

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In Maine Yankee's 1988 rate case, the MPUC acquiesced in a settlement negotiated by the parties which fixed, inter alia, Maine Yankee's decommissioning expense and its rate of return on common equity. *Maine Yankee*, 581 A.2d at 802, App. 62. *See also* Settlement Agreement, App. 53-57. The MPUC, a party to the proceeding, neither objected to nor appealed from FERC's approval of the settlement or FERC's exercise of jurisdiction.[20] *Maine Yankee*, 581 A.2d at 801, App. 61. Instead, it

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1941), *cert. denied*, 316 U.S. 663 (1942) (holding that procedure for review established by § 825*l* is "exclusive"); *Mega Renewables v. County of Shasta*, 644 F.Supp. 491, 499 (E.D. Cal. 1986) ("whether or not FERC should have issued a license for this project is a question that should have been litigated before FERC and, if necessary, appealed directly to the Ninth Circuit"); *Washington Pub. Power Supply Sys. v. Pacific N.W. Power Co.*, 213 F.Supp. 404, 408 (D. Or. 1962) (holding that § 825*l* provides a "specific, complete and exhaustive mode of judicial interpretation and construction" of FERC orders); *Northern States Power Co. v. Hagen*, 314 N.W.2d 32, 38 (N.D. 1981) (proper procedure for challenge to and determination of the justness and reasonableness of apportionment of a loss relative to wholesale charges " . . . is to follow the remedies available in the proceeding for FERC [including] . . . appeals to the proper court").

[20] In Maine Yankee's 1981 FERC rate case, the issue of FERC's exclusive jurisdiction over Maine Yankee's decommissioning expense was raised by Petitioner when it complained that FERC should approve no settlement of Maine Yankee's decommissioning expense that did not reflect the provisions of the newly-enacted NDFA. *Maine Yankee Atomic Power Co.*, 20 F.E.R.C. ¶61,141 at 61,398. FERC rejected Petitioner's objections and approved a settlement which neither accommodated the Maine law nor acknowledged its validity. *Id.* at 61,310. Petitioner took no appeal from this final order of FERC.

returned to Maine and issued its own order purporting to change the results reached at FERC and denying FERC's exclusive jurisdiction over Maine Yankee's decommissioning. For this Court now to hear Petitioner's challenge to FERC authority is to sanction Petitioner's collateral attack on the 1988 FERC order and to encourage evasion of the procedural remedies explicitly provided by Congress in Section 825*l*(b). Accordingly, the petition for certiorari should be denied.

VIII. CONCLUSION

The petition for certiorari should be denied because (1) it presents no important question of federal law, (2) the decision of the Supreme Judicial Court of Maine is not in conflict with the reported decision of any court in the United States of America, (3) the state court decision was clearly correct in concluding that the MPUC order and the NDFA are preempted, and (4) Petitioner's challenge to FERC jurisdiction over Respondent's decommissioning is an impermissible collateral attack on a final, unappealed order of FERC.

Dated: February 22, 1991

Respectfully submitted,

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APPENDIX A

RELEVANT SECTIONS FROM THE FEDERAL POWER ACT, 16 U.S.C. §§ 791a *et seq.* (1989)

SUBCHAPTER II – REGULATION OF ELECTRIC UTILITY COMPANIES ENGAGED IN INTERSTATE COMMERCE

§ 824. Declaration of policy; application of subchapter

(a) Federal regulation of transmission and sale of electric energy

It is declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this subchapter and subchapter III of this chapter and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

(b) Use or sale of electric energy in interstate commerce

(1) The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but except as provided in paragraph (2) shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission

shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

(2) The provisions of sections 824i, 824j, and 824k of this title shall apply to the entities described in such provisions, and such entities shall be subject to the jurisdiction of the Commission for purposes of carrying out such provisions and for purposes of applying the enforcement authorities of this chapter with respect to such provisions. Compliance with any order of the Commission under the provisions of section 823i or 824j of this title, shall not make an electric utility or other entity subject to the jurisdiction of the Commission for any purposes other than the purposes specified in the preceding sentence.

(c) Electric energy in interstate commerce

For the purpose of this subchapter, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

(d) "Sale of electric energy at wholesale" defined

The term "sale of electric energy at wholesale" when used in this subchapter, means a sale of electric energy to any person for resale.

(e) "Public utility" defined

The term "public utility" when used in this subchapter and subchapter III of this chapter means any person who owns or operates facilities subject to the jurisdiction of the Commission under this subchapter (other than facilities subject to such jurisdiction solely by reason of section 824i, 824j, or 824k of this title).

(f) United States, State, political subdivision of a State, or agency or instrumentality thereof exempt

No provision in this subchapter shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.

(June 10, 1920, ch. 285, § 201, as added Aug. 26. 1935, ch. 687, title II, § 213, 49 Stat. 847, and amended Nov. 9, 1978, Pub. L. 95-617, title II, § 204(b), 92 Stat. 3140.)

* * *

§ 824e. Power of Commission to fix rates and charges; determination of cost of production or transmission

(a) Unjust or preferential rates, etc.; statement of reasons for changes; hearing; specification of issues

Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affected such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. Any complaint or motion of the Commission to initiate a proceeding under this section shall state the change or changes to be made in the rate, charge, classification, rule, regulation, practice, or contract then in force, and the reasons for any proposed change or changes therein. If, after review of any motion or complaint and answer, the Commission shall decide to hold a hearing, it shall fix by order the time and place of such hearing and shall specify the issues to be adjudicated.

(b) Refund effective date; preferential proceedings; statement of reasons for delay; burden of proof; scope of refund order; refund orders in cases of dilatory behavior; interest

Whenever the Commission institutes a proceeding under this section, the Commission shall establish a refund effective date. In the case of a proceeding instituted on complaint, the refund effective date shall not be earlier than the date 60 days after the filing of such complaint nor later than 5 months after the expiration of such 60-day period. In the case of a proceeding instituted by the Commission on its own motion, the refund effective date shall not be earlier than the date 60 days after the publication by the Commission of notice of its intention to initiate such proceeding nor later than 5 months after the expiration of such 60-day period. Upon institution of a proceeding under this section, the Commission shall give to the decision of such proceeding the same preference as provided under section 824d of this title and otherwise act as speedily as possible. If no final decision is rendered by the refund effective date or by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to this section, whichever is earlier, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision. In any proceeding under this section, the burden of proof to show that any rate, charge, classification, rule, regulation, practice, or contract is unjust, unreasonable, unduly discriminatory, or preferential shall be upon the Commission or the complainant. At the conclusion of any proceeding under this section, the Commission may order the public utility to make refunds of any amounts paid,

for the period subsequent to the refund effective date through a date fifteen months after such refund effective date, in excess of those which would have been paid under the just and reasonable rate, charge, classification, rule, regulation, practice, or contract which the Commission orders to be thereafter observed and in force: *Provided,* That if the proceeding is not concluded within fifteen months after the refund effective date and if the Commission determines at the conclusion of the proceeding that the proceeding was not resolved within the fifteen-month period primarily because of dilatory behavior by the public utility, the Commission may order refunds of any or all amounts paid for the period subsequent to the refund effective date and prior to the conclusion of the proceeding. The refunds shall be made, with interest, to those persons who have paid those rates or charges which are the subject of the proceeding.

(c) Refund considerations; shifting costs; reduction in revenues; "electric utility companies" and "registered holding company" defined

Notwithstanding subsection (b) of this section, in a proceeding commenced under this section involving two or more electric utility companies of a registered holding company, refunds which might otherwise be payable under subsection (b) of this section shall not be ordered to the extent that such refunds would result from any portion of a Commission order that (1) requires a decrease in system production or transmission costs to be paid by one or more of such electric companies; and (2) is based upon a determination that the amount of such decrease should be paid through an increase in the costs

to be paid by other electric utility companies of such registered holding company: *Provided*, That refunds, in whole or in part, may be ordered by the Commission if it determines that the registered holding company would not experience any reduction in revenues which results from an inability of an electric utility company of the holding company to recover such increase in costs for the period between the refund effective date and the effective date of the Commission's order. for purposes of this subsection, the terms "electric utility companies" and "registered holding company" shall have the same meanings as provided in the Public Utility Holding Company Act of 1935, as amended [15 U.S.C. 79 et seq.].

(d) Investigation of costs

The Commission upon its own motion, or upon the request of any State commission whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transmission of electric energy by means of facilities under the jurisdiction of the Commission in cases where the Commission has no authority to establish a rate governing the sale of such energy.

(June 10, 1920, ch. 285, § 206, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 852, and amended Oct. 6, 1988, Pub. L. 100-473, § 2, 102 Stat. 2299.)

* * *

SUBCHAPTER III – LICENSEES AND PUBLIC UTILITIES; PROCEDURAL AND ADMINISTRATIVE PROVISIONS

§ 825. Accounts and records

(a) Duty to keep

Every licensee and public utility shall make, keep, and preserve for such periods, such accounts, records of cost-accounting procedures, correspondence, memoranda, papers, books, and other records as the Commission may be rules and regulations prescribe as necessary or appropriate for purposes of the administration of this chapter, including accounts, records, and memoranda of the generation, transmission, distribution, delivery, or sale of electric energy, the furnishing of services or facilities in connection therewith, and receipts and expenditures with respect to any of the foregoing: *Provided, however,* That nothing in this chapter shall relieve any public utility from keeping any accounts, memoranda, or records which such public utility may be required to keep by or under authority of the laws of any State. The Commission may prescribe a system of accounts to be kept by licensees and public utilities and may classify such licensees and public utilities and prescribe a system of accounts for each class. The Commission, after notice and opportunity for hearing, may determine by order the accounts in which particular outlays and receipts shall be entered, charged, or credited. The burden of proof to justify every accounting entry questioned by the Commission shall be on the person making, authorizing, or requiring such entry, and the Commission may suspend a charge or credit pending submission of satisfactory proof in support thereof.

(b) Access to and examination by the Commission

The Commission shall at all times have access to and the right to inspect and examine all accounts, records, and memoranda of licensees and public utilities, and it shall be the duty of such licensees and public utilities to furnish to the Commission, within such reasonable time as the Commission may order, any information with respect thereto which the Commission may by order require, including copies of maps, contracts, reports of engineers, and other data, records, and papers, and to grant to all agents of the Commission free access to its property and its accounts, records, and memoranda when requested so to do. No member, officer, or employee of the Commission shall divulge any fact or information which may come to his knowledge during the course of examination of books or other accounts, as hereinbefore provided, except insofar as he may be directed by the Commission or by a court.

(c) Controlling individual

The books, accounts, memoranda, and records of any person who controls, directly or indirectly, a licensee or public utility subject to the jurisdiction of the Commission, and of any other company controlled by such person, insofar as they relate to transactions with or the business of such licensee or public utility, shall be subject to examination on the order of the Commission.

(June 10, 1920, ch. 285, § 301, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 854.)

* * *

§ 825a. Rates of depreciation; notice to State authorities before fixing

(a) The Commission may, after hearing, require licensees and public utilities to carry a proper and adequate depreciation account in accordance with such rules, regulations, and forms of account as the Commission may prescribe. The Commission may, from time to time, ascertain and determine, and by order fix, the proper and adequate rates of depreciation of the several classes of property of each licensee and public utility. Each licensee and public utility shall conform its depreciation accounts to the rates so ascertained, determined, and fixed. The licensees and public utilities subject to the jurisdiction of the Commission shall not charge to operating expenses any depreciation charges on classes of property other than those prescribed by the Commission, or charge with respect to any class of property a percentage of depreciation other than that prescribed therefore by the Commission. No such licensee or public utility shall in any case include in any form under its operating or other expenses any depreciation or other charge or expenditure included elsewhere as a depreciation charge or otherwise under its operating or other expenses. Nothing in this section shall limit the power of a State commission to determine in the exercise of its jurisdiction, with respect to any public utility, the percentage rate of depreciation to be allowed, as to any class or property of such public utility, or the composite depreciation rate, for the purpose of determining rates or charges.

(b) The Commission, before prescribing any rules or requirements as to accounts, records, or memoranda, or

as to depreciation rates, shall notify each State commission having jurisdiction with respect to any public utility involved, and shall give reasonable opportunity to each such commission to present its views, and shall receive and consider such views and recommendations.

(June 10, 1920, ch. 285, § 302, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 855.)

* * *

§ 825l. Review of orders

(a) Application of rehearing; time periods; modification of order

Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b) of this section, the Commission may at any time, upon reasonable notice

and in such manner, as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b) Judicial review

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States court of appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith by transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show

to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

(c) Stay of Commission's order

The filing of an application for rehearing under subsection (a) of this section shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

(June 10, 1920, ch. 285, § 313, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 860, and amended June 25,

1948, ch. 646, § 32(a), 62 Stat. 991; May 24, 1949, ch. 139, § 127, 63 Stat. 107; Aug. 28, 1958, Pub. L. 85-791, § 16, 72 Stat. 947.)

APPENDIX B

I.R.C. § 468A (1989)

§ 468A. Special rules for nuclear decommissioning costs

(a) In general

If the taxpayer elects the application of this section, there shall be allowed as a deduction for any taxable year the amount of payments made by the taxpayer to a Nuclear Decommissioning Reserve Fund (hereinafter referred to as the "Fund") during such taxable year.

(b) Limitation on amounts paid into Fund

The amount which a taxpayer may pay into the Fund for any taxable year shall not exceed the lesser of –

(1) the amount of nuclear decommissioning costs allocable to the Fund which is included in the taxpayer's cost of service for ratemaking purposes for such taxable year, or

(2) The ruling amount applicable to such taxable year.

(c) Income and deductions of the taxpayer

(1) Inclusion of amounts distributed

There shall be includible in the gross income of the taxpayer for any taxable year –

(A) any amount distributed from the Fund during such taxable year, other than any amount distributed to pay costs described in subsection (e)(4)(B), and

(B) except to the extent provided in regulations, amounts properly includible in gross income in the case of any deemed

distribution under subsection (e)(6), any termination under subsection (e)(7), or the disposition of any interest in the nuclear powerplant.

(2) Deduction when economic performance occurs

In addition to any deduction under subsection (a), there shall be allowable as a deduction for any taxable year the amount of the nuclear decommissioning costs with respect to which economic performance (within the meaning of section 461(h)(2)) occurs during such taxable year.

(d) Ruling amount

For purposes of this section –

(1) Request required

No deduction shall be allowed for any payment to the Fund unless the taxpayer requests, and receives, from the Secretary a schedule of ruling amounts.

(2) Ruling amount

The term "ruling amount" means, with respect to any taxable year, the amount which the Secretary determines under paragraph (1) to be necessary to –

(A) fund that portion of the nuclear decommissioning costs of the taxpayer with respect to the nuclear powerplant which bears the same ratio to the total nuclear decommissioning costs with respect to such nuclear powerplant as the period for which the Fund is in effect bears to the estimated useful life of such nuclear powerplant, and

(B) prevent any excessive funding of such costs or the funding of such costs at a

rate more rapid than level funding, taking into account such discount rates as the Secretary deems appropriate.

(3) Review of amount

The Secretary shall at least once during the useful life of the nuclear powerplant (or more frequently, upon the request of the taxpayer) review, and revise if necessary, the schedule of ruling amounts determined under paragraph (1).

(e) Nuclear Decommissioning Reserve Fund

(1) In general

Each taxpayer who elects the application of this section shall establish a Nuclear Decommissioning Reserve Fund with respect to each nuclear powerplant to which such election applies.

(2) Taxation of fund

(A) In general

There is hereby imposed on the gross income of the Fund for any taxable year a tax at a rate equal to the highest rate of tax specified in section 11(b), except that –

(i) there shall not be included in the gross income of the Fund any payment to the Fund with respect to which a deduction is allowable under subsection (a), and

(ii) there shall be allowed as a deduction to the Fund any amount paid by the Fund which is described in paragraph (4)(B) (other than an amount paid to the taxpayer) and which would be

deductible under this chapter for purposes of determining the taxable income of a corporation.

(B) Tax in lieu of other taxation

The tax imposed by subparagraph (A) shall be in lieu of any other taxation under this subtitle of the income from assets in the Fund.

(C) Fund treated as corporation

For purposes of subtitle F –

(i) the Fund shall be treated as if it were a corporation, and

(ii) any tax imposed by this paragraph shall be treated as a tax imposed by section 11.

(3) Contributions to Fund

The Fund shall not accept any payments (or other amounts) other than payments with respect to which a deduction is allowable under subsection (a).

(4) Use of Fund

The Fund shall be used exclusively for –

(A) satisfying, in whole or in part, any liability of any person contributing to the Fund for the decommissioning of a nuclear powerplant (or unit thereof),

(B) to pay administrative costs (including taxes) and other incidental expenses of the Fund (including legal, accounting, actuarial, and trustee expenses) in connection with the operation of the Fund, and

(C) to the extent that a portion of the Fund is not currently needed for purposes

described in subparagraph (A) or (B), making investments described in section 501(c)(21)(B)(ii).

(5) Prohibitions against self-dealing

Under regulations prescribed by the Secretary, for purposes of section 4951 (and so much of this title as relates to such section), the Fund shall be treated in the same manner as a trust described in section 501(c)(21).

(6) Disqualification of Fund

In any case in which the Fund violates any provision of this section or section 4951, the Secretary may disqualify such Fund from the application of this section. In any case to which this paragraph applies, the Fund shall be treated as having distributed all of its funds on the date such determination takes effect.

(7) Termination upon completion

Upon substantial completion of the nuclear decommissioning of the nuclear powerplant with respect to which a Fund relates, the taxpayer shall terminate such Fund.

(f) Nuclear powerplant

For purposes of this section, the term "nuclear powerplant" includes any unit thereof.

(g) Time when payments deemed made

For purposes of this section, a taxpayer shall be deemed to have made a payment to the Fund on the last day of a taxable year if such payment is made on account of such taxable year and is made within 2½ months after the close of such taxable year.

(Added Pub. L. 98-369, div. A, title I, § 91(c)(1), July 18, 1984, 98 Stat. 604, and amended Pub. L. 99-514, title XVIII, § 1807(a)(4)(A)(i), (B)-(E)(vi), Oct. 22, 1986, 100 Stat. 2812, 2813.)

APPENDIX C

RELEVANT SECTIONS FROM REGULATIONS OF THE NUCLEAR REGULATORY COMMISSION 10 C.F.R. PART 50 (1990)

PART 50 – DOMESTIC LICENSING OF PRODUCTION AND UTILIZATION FACILITIES

APPLICATIONS FOR LICENSES, FORM, CONTENTS, INELIGIBILITY OF CERTAIN APPLICANTS

§ 50.33 Contents of applications; general information.

Each application shall state:

(a) Name of applicant;

(b) Address of applicant;

(c) Description of business or occupation of applicant;

(d)(1) If applicant is an individual, state citizenship.

(2) If applicant is a partnership, state name, citizenship and address of each partner and the principal location where the partnership does business.

(3) If applicant is a corporation or an unincorporated association, state:

(i) The state where it is incorporated or organized and the principal location where it does business;

(ii) The names, addresses and citizenship of its directors and of its principal officers;

(iii) Whether it is owned, controlled, or dominated by an alien, a foreign corporation, or foreign government, and if so, give details.

(4) If the applicant is acting as agent or representative of another person in filing the application, identify the principal and furnish information required under this paragraph with respect to such principal.

(e) The class of license applied for, the use to which the facility will be put, the period of time for which the license is sought, and a list of other licenses, except operator's licenses, issued or applied for in connection with the proposed facility.

(f) Except for an electric utility applicant for a license to operate a utilization facility of the type described in § 50.21(b) or § 50.22, information sufficient to demonstrate to the Commission the financial qualification of the applicant to carry out, in accordance with regulations in this chapter, the activities for which the permit or license is sought. As applicable, the following should be provided:

(1) If the application is for a construction permit, the applicant shall submit information that demonstrates that the applicant possesses or has reasonable assurance of obtaining the funds necessary to cover estimated construction costs and related fuel cycle costs. The applicant shall submit estimates of the total construction costs of the facility and related fuel cycle costs, and shall indicate the source(s) of funds to cover these costs.

(2) If the application is for an operating license, the applicant shall submit information that demonstrates the applicant possesses or has reasonable assurance of obtaining the funds necessary to cover estimated operation costs for the period of the license. The applicant shall submit estimates for total annual operating costs for each

of the first five years of operation of the facility. The applicant shall also indicate the source(s) of funds to cover these costs. An application to renew or extend the term of an operating license must include the same financial information as is required in an application for an initial license.

(3) Each application for a construction permit or an operating license submitted by a newly-formed entity organized for the primary purpose of constructing or operating a facility must also include information showing:

(i) The legal and financial relationships it has or proposes to have with its stockholders or owners;

(ii) Its financial ability to meet any contractual obligation to the entity which they have incurred or proposed to incur; and

(iii) Any other information considered necessary by the Commission to enable it to determine the applicant's financial qualification.

(4) The Commission may request an established entity or newly-formed entity to submit additional or more detailed information respecting its financial arrangements and status of funds if the Commission considers this information appropriate. This may include information regarding a licensee's ability to continue the conduct of the activities authorized by the license and to decommission the facility.

(g) If the application is for an operating license for a nuclear power reactor, the applicant shall submit radiological emergency response plans of State and local governmental entities in the United States that are wholly or partially within the plume exposure pathway Emergency Planning Zone (EPZ)[3], as well as the plans of State governments wholly or partially within the ingestion pathway EPZ.[4] Generally, the plume exposure pathway EPZ for nuclear power reactors shall consist of an area about 10 miles (16 km) in radius and the ingestion pathway EPZ shall consist of an area about 50 miles (80 km) in radius. The exact size and configuration of the EPZs surrounding a particular nuclear power reactor shall be determined in relation to the local emergency response needs and capabilities as they are affected by such conditions as demography, topography, land characteristics, access routes, and jurisdictional boundaries. The size of the EPZs also may be determined on a case-by-case basis for gas-cooled reactors and for reactors with an authorized power level less than 250 MW thermal. The plans for the ingestion pathway shall focus on such actions as are appropriate to protect the food ingestion pathway.

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[3] Emergency Planning Zones (EPZs) are discussed in NUREG-0396, EPA 520/1-78-016, "Planning Basis for the Development of State and Local Government Radiological Emergency Response Plans in Support of Light-Water Nuclear Power Plants," December 1978.

[4] If the State and local emergency response plans have been previously provided to the NRC for inclusion in the facility docket, the applicant need only provide the appropriate reference to meet this requirement.

(h) If the applicant proposes to construct or alter a production or utilization facility, the application shall state the earliest and latest dates for completion of the construction or alteration.

(i) If the proposed activity is the generation and distribution of electric energy under a class 103 license, a list of the names and addresses of such regulatory agencies as may have jurisdiction over the rates and services incident to the proposed activity, and a list of trade and news publications which circulate in the area where the proposed activity will be conducted and which are considered appropriate to give reasonable notice of the application to those municipalities, private utilities, public bodies, and cooperatives, which might have a potential interest in the facility.

(j) If the application contains Restricted Data or other defense information, it shall be prepared in such manner that all Restricted Data and other defense information are separated from the unclassified information.

(k)(1) For an application for an operating license for a production or utilization facility, information in the form of a report, as described in § 50.75 of this part, indicating how reasonable assurance will be provided that funds will be available to decommission the facility.

(2) On or before July 26, 1990, each holder of an operating license for a production or utilization facility in effect on July 27, 1990, shall submit information in the form of a report as described in § 50.75 of this part, indicating how reasonable assurance will be provided that funds will be available to decommission the facility.

* * *

§ 50.75 Reporting and recordkeeping for decommissioning planning.

(a) This section establishes requirements for indicating to NRC how reasonable assurance will be provided that funds will be available for decommissioning. For electric utilities it consists of a step-wise procedure as provided in paragraphs (b), (c), (e), and (f) of this section. Funding for decommissioning of electric utilities is also subject to the regulation of agencies (e.g., Federal Energy Regulatory Commission (FERC) and State Public Utility Commissions) having jurisdiction over rate regulation. The requirements of this section, in particular paragraph (c), are in addition to, and not substitution for, other requirements, and are not intended to be used, by themselves, by other agencies to establish rates.

(b) Each electric utility applicant for or holder of an operating license for a production or utilization facility of the type and power level specified in paragraph (c) of this section shall submit a decommissioning report, as required by § 50.33(k) of this part containing a certification that financial assurance for decommissioning will be provided in an amount which may be more but not less than the amount stated in the table in paragraph (c)(1) of this section, adjusted annually using a rate at least equal to that stated in paragraph (c)(2) of this section, by one or more of the methods described in paragraph (e) of this section as acceptable to the Commission. The amount stated in the applicant's or licensee's certification may be based on a cost estimate for decommissioning the facility. As part of the certification, a copy of the financial instrument obtained to satisfy the requirements of paragraph (e) of this section is to be submitted to NRC.

(c) Table of minimum amounts (January 1986 dollars) required to demonstrate reasonable assurance of funds for decommissioning by reactor type and power level, P (in MWt); adjustment factor.[1]

	Millions
(1)(i) For a PWR:	
greater than or equal to 3400 MWt.....	$105
between 1200 MWt and 3400 MWt (For a PWR of less than 1200 MWt, use P = 1200 MWt)	$(75+0.0088P)
(ii) For a BWR:	
greater than or equal to 3400 MWt.....	$135
between 1200 MWt and 3400 MWt (For a BWR of less than 1200 MWt, use P = 1200 MWt)	$(104+0.009P)

(2) An adjustment factor at least equal to 0.65 L + 0.13 E + 0.22 B is to be used where L and E are escalation factors for labor and energy, respectively, and are to be taken from regional data of U.S. Department of Labor Bureau of Labor Statistics and B is an escalation factor for waste burial and is to be taken from NRC report NUREG-1307, "Report on Waste Burial Charges."

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[1] Amounts are based on activities related to the definition of "Decommission" in § 50.2 of this part and do not include the cost of removal and disposal of spent fuel or of nonradioactive structures and materials beyond that necessary to terminate the license.

(d) Each non-electric utility applicant for or holder of an operating license for a production or utilization facility shall submit a decommissioning report as required by § 50.33(k) of this part containing a cost estimate for decommissioning the facility, an indication of which method or methods described in paragraph (e) of this section as acceptable to the Commission will be used to provide funds for decommissioning, and a description of the means of adjusting the cost estimate and associated funding level periodically over the life of the facility.

(e)(1) As provided in paragraphs (e) (2) and (3) of this section, financial assurance is to be provided by the following methods:

(i) Prepayment. Prepayment is the deposit prior to the start of operation into an account segregated from licensee assets and outside the licensee's administrative control of cash or liquid assets such that the amount of funds would be sufficient to pay decommissioning costs. Prepayment may be in the form of a trust, escrow account, government fund, certificate of deposit, or deposit of government securities.

(ii) External sinking fund. An external sinking fund is a fund established and maintained by setting funds aside periodically in an account segregated from licensee assets and outside the licensee's administrative control in which the total amount of funds would be sufficient to pay decommissing costs at the time termination of operation is expected. An external sinking fund may be in the form of a trust, escrow account, government fund, certificate of deposit, or deposit of government securities.

(iii) A surety method, insurance, or other guarantee method. These methods guarantee that decommissioning costs will be paid should the licensee default. A surety method may be in the form of a surety bond, letter of credit, or line of credit. Any surety method or insurance used to provide financial insurance for decommissioning must contain the following conditions:

(A) The surety method or insurance must be open-ended or, if written for a specified term, such as five years, must be renewed automatically unless 90 days or more prior to the renewal date, the issuer notifies the Commission, the beneficiary, and the licensee of its intention not to renew. The surety or insurance must also provide that the full face amount be paid to the beneficiary automatically prior to the expiration without proof of forfeiture if the licensee fails to provide a replacement acceptable to the Commission within 30 days after receipt of notification of cancellation.

(B) The surety or insurance must be payable to a trust established for decommissioning costs. The trustee and trust must be acceptable to the Commission. An acceptable trustee includes an appropriate State or Federal government agency or an entity which has the authority to act as a trustee and whose trust operations are regulated and examined by a Federal or State agency.

(C) The surety method or insurance must remain in effect until the Commission has terminated the license.

(2) For a licensee other than an electric utility, acceptable methods of providing financial assurance for decommissioning are–

(i) Prepayment;

(ii) An external sinking fund, in which deposits are made at least annually, coupled with a surety method or insurance, the value of which may decrease by the amount being accumulated in the sinking fund,

(iii) A surety method, insurance, or other guarantee method. A parent company guarantee of funds for decommissioning costs based on a financial test may be used if the guarantee and test are as contained in Appendix A of 10 CFR Part 30. A parent company guarantee may not be used in combination with other financial methods to satisfy the requirements of this section.

(iv) In the case of Federal, State, or local government licensees, a statement of intent containing a cost estimate for decommissioning, and indicating that funds for decommissioning will be obtained when necessary.

(3) For an electric utility, acceptable methods of providing financial assurance for decommissioning are–

(i) Prepayment;

(ii) An external sinking fund in which deposits are made at least annually:

(iii) A surety method or insurance; and

(iv) In the case of Federal government licensees, a statement of intent containing a cost estimate for decommissioning or an amount based on paragraph (c) of this section, and indicating that funds for decommissioning will be obtained when necessary.

(f) Each licensee shall at or about 5 years prior to the projected end of operation submit a preliminary

decommissioning plan containing a cost estimate for decommissioning and an up-to-date assessment of the major technical factors that could affect planning for decommissioning. Factors to be considered in submitting this information include–

(1) The decommissioning alternative anticipated to be used. The requirements of § 50.82(b)(1) must be considered at this time;

(2) Major technical actions necessary to carry out decommissioning safely;

(3) The current situation with regard to disposal of high-level and low-level radioactive waste;

(4) Residual radioactivity criteria;

(5) Other site specific factors which could affect decommissioning planning and cost.

If necessary, this submittal shall also include plans for adjusting levels of funds assured for decommissioning to demonstrate that a reasonable level of assurance will be provided that funds will be available when needed to cover the costs of decommissioning.

(g) Each licensee shall keep records of information important to the safe and effective decommissioning of the facility in an identified location until the license is terminated by the Commission. If records of relevant information are kept for other purposes, reference to these records and their locations may be used. Information the Commission considers important to decommissioning consists of–

(1) Records of spills or other unusual occurrences involving the spread of contamination in and around the facility, equipment, or site. These records may be limited to instances when significant contamination remains after any cleanup procedures or when there is reasonable likelihood that contaminants may have spread to inaccessible areas as in the case of possible seepage into porous materials such as concrete. These records must include any known information on identification of involved nuclides, quantities, forms, and concentrations.

(2) As-built drawings and modifications of structures and equipment in restricted areas where radioactive materials are used and/or stored and of locations of possible inaccessible contamination such as buried pipes which may be subject to contamination. If required drawings are referenced, each relevant document need not be indexed individually. if drawings are not available, the licensee shall substitute appropriate records of available information concerning these areas and locations.

(3) Records of the cost estimate performed for the decommissioning funding plan or of the amount certified for decommissioning, and records of the funding method used for assuring funds if either a funding plan or certification is used.

[53 FR 24049, June 27, 1988]

* * *

§ 50.82 Application for termination of license.

(a) Any licensee may apply to the Commission for authority to surrender a license voluntarily and to

decommission the facility. For a facility that permanently ceases operation after July 27, 1988, this application must be made within two years following permanent cessation of operations, and in no case later than one year prior to expiration of the operating license. Each application for termination of license must be accompanied, or preceded, by a proposed decommissioning plan. For a facility which has permanently ceased operation prior to July 27, 1988, requirements for contents of the decommissioning plan as specified in paragraphs (b) through (d) of this section may be modified with approval of the Commission to reflect the fact that the decommissioning process has been initiated previously.

(b) The proposed decommissioning plan must include–

(1) The choice of the alternative for decommissioning with a description of activities involved.

(i) For an electric utility licensee, an alternative is acceptable if it provides for completion of decommissioning within 60 years. Consideration will be given to an alternative which provides for completion of decommissioning beyond 60 years only when necessary to protect the public health and safety. Factors to be considered in evaluating an alternative which provides for completion of decommissioning beyond 60 years are set out in paragraph (b)(1)(iii) of this section.

(ii) For a licensee other than an electric utility, an alternative is acceptable if it provides for completion of decommissioning without significant delay. Consideration will be given to an alternative which provides for

delayed completion of decommissioning only when necessary to protect the public health and safety. Factors to be considered in evaluating an alternative which provides for delayed completion of decommissioning are set out in paragraph (b)(1)(iii) of this section.

(iii) Factors to be considered in making the evaluations required by paragraphs (b)(1)(i) and (b)(1)(ii) of this section include unavailability of waste disposal capacity and other site specific factors affecting the licensee's capability to carry out decommissioning safely, including presence of other nuclear facilities at the site.

(2) A description of controls and limits on procedures and equipment to protect occupational and public health and safety;

(3) A description of the planned final radiation survey;

(4) An updated cost estimate for the chosen alternative for decommissioning, comparison of that estimate with present funds set aside for decommissioning, and plan for assuring the availability of adequate funds for completion of decommissioning.

(5) A description of technical specifications, quality assurance provisions and physical security plan provisions in place during decommissioning,

(c) Decommissioning plans which propose an alternative that delays completion of decommissioning by including a period of storage or long-term surveillance must provide that–

(1) Funds needed to complete decommissioning be placed into an account segregated from licensee assets

and outside the licensee's administrative control during the storage or surveillance period, or a surety method or fund statement of intent be maintained in accordance with the criteria of § 50.75(e), and

(2) Means be included for adjusting cost estimates and associated funding levels over the storage or surveillance period.

(d) For decommissioning plans in which the major dismantlement activities are delayed by first placing the facility in storage, planning for these delayed activities may be less detailed. Updated detailed plans must be submitted and approved prior to the start of these activities.

(e) If the decommissioning plan demonstrates that the decommissioning will be performed in accordance with the regulations in this chapter and will not be inimical to the common defense and security or to the health and safety of the public, and after notice to interested persons, the Commission will approve the plan subject to such conditions and limitations as it deems appropriate and necessary and issue an order authorizing the decommissioning.

(f) The Commission will terminate the license if it determines that–

(1) The decommissioning has been performed in accordance with the approved decommissioning plan and the order authorizing decommissioning; and

(2) The terminal radiation survey and associated documentation demonstrates that the facility and site are suitable for release for unrestricted use.

[53 FR 24051, June 27, 1988]

APPENDIX D

RELEVANT SECTIONS FROM THE ATOMIC ENERGY ACT OF 1954, 42 U.S.C. § 2011 *et seq.* (1988)

§ 2019. Applicability of Federal Power Act

Every licensee under this chapter who holds a license from the Commission for a utilization or production facility for the generation of commercial electric energy under section 2133 of this title and who transmits such electric energy in interstate commerce or sells it at wholesale in interstate commerce shall be subject to the regulatory provisions of the Federal Power Act.

Aug. 1, 1946, c. 724, § 272, as added Aug. 30, 1954, c. 1073, § 1, 68 Stat. 960.

* * *

§ 2021. Cooperation with States – Purpose

(a) It is the purpose of this section –

(1) to recognize the interests of the States in the peaceful uses of atomic energy, and to clarify the respective responsibilities under this chapter of the States and the Commission with respect to the regulation of byproduct, source, and special nuclear materials;

(2) to recognize the need, and establish programs for, cooperation between the States and the Commission with respect to control of radiation hazards associated with use of such materials;

(3) to promote an orderly regulatory pattern between the Commission and State governments with respect to nuclear development and

use and regulation of byproduct, source, and special nuclear materials;

(4) to establish procedures and criteria for discontinuance of certain of the Commission's regulatory responsibilities with respect to byproduct, source, and special nuclear materials, and the assumption thereof by the States;

(5) to provide for coordination of the development of radiation standards for the guidance of Federal agencies and cooperation with the States; and

(6) to recognize that, as the States improve their capabilities to regulate effectively such materials, additional legislation may be desirable.

Agreements with States

(b) Except as provided in subsection (c) of this section, the Commission is authorized to enter into agreements with the Governor of any State providing for discontinuance of the regulatory authority of the Commission under subchapters V, VI, and VII of this chapter, and section 2201 of this title, with respect to any one or more of the following materials within the State –

(1) byproduct materials;

(2) source materials;

(3) special nuclear materials in quantities not sufficient to form a critical mass.

During the duration of such an agreement it is recognized that the State shall have authority to regulate the materials covered by the agreement for the protection of the public health and safety from radiation hazards.

Commission regulation of certain activities

(c) No agreement entered into pursuant to subsection (b) of this section shall provide for discontinuance of any authority and the Commission shall retain authority and responsibility with respect to regulation of –

(1) the construction and operation of any production or utilization facility;

(2) the export from or import into the United States of byproduct, source, or special nuclear material, or of any production or utilization facility;

(3) the disposal into the ocean or sea of byproduct, source, or special nuclear waste materials as defined in regulations or orders of the Commission;

(4) the disposal of such other byproduct, source, or special nuclear material as the Commission determines by regulation or order should, because of the hazards or potential hazards thereof, not be so disposed of without a license from the Commission.

Notwithstanding any agreement between the Commission and any State pursuant to subsection (b) of this section, the Commission is authorized by rule, regulation, or order to require that the manufacturer, processor, or producer of any equipment, device, commodity, or other product containing source, byproduct, or special nuclear material shall not transfer possession or control of such product except pursuant to a license issued by the Commission.

APPENDIX E

U.S. CONST. art. vi, cl. 2

Clause 2. Supreme Law of Land

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

APPENDIX F

STATE OF MAINE
PUBLIC UTILITIES
COMMISSION

Docket No. 82-179

March 23, 1990

MAINE YANKEE ATOMIC
POWER COMPANY
Re: Decommissioning Financing
Plan

ORDER
GRANTING
MAINE
YANKEE'S
REQUEST FOR
STAY

GORDON, Chairman; HARRINGTON and PAINE, Commissioners

Maine Yankee filed, on March 1, 1990, a Motion to Stay or Modify parts of our final Order in this case. That Order was issued on February 22, 1990. Maine Yankee filed a similar Motion on March 12, 1990, framing it as a Request for Reconsideration. Both filings request the same relief from the operation of our Order. The filings request that we stay the operation of the second sentence of paragraph 3 on page 52 of the order as well as paragraph 4 on page 52 of the Order until the February 22 Order is judicially determined by a final judgment to be valid and, if valid, until the Federal Energy Regulatory Commission approves the necessary tariff amendments authorizing Maine Yankee to bill and to collect from its wholesale customers the increased payments to the Decommissioning Trust Fund being ordered by our February 22, 1990 Order.

We grant Maine Yankee's requests in part but wish to clarify parts of our Order and delineate specifically the terms under which we grant the stay sought.

Paragraph 7 of each of Maine Yankee's filings notes that our Order at page 45 requires Maine Yankee, in order to comply with 35-A M.R.S.A. § 4353(3)(B)(2), to adjust the annual amount charged to all of its customers on a pro rata basis. That section of our Order reads as follows:

> We find that the manner in which the costs are shared is reasonable; that is, *pro rata* based on the amount of output to which each of Maine Yankee's customers is entitled. The annual amount to be charged, of course, must be adjusted in accordance with our finding concerning the cost of decommissioning.

Maine Yankee argues that it is not possible without FERC approval to comply with this section of the Order because, we presume, we cannot order a change in the amount that Maine Yankee's customers pay to Maine Yankee, whether or not that money will be paid to the trust fund. The amounts paid by customers is of course a rate for electric service. Because Maine Yankee is a wholesale utility, of course all rates are set by FERC.

35-A M.R.S.A. § 4353(3)(B)(2) reads as follows:

> B. The commission shall approve the decommissioning financing plan if it finds that the licensee, in the judgment of the commission, has provided reasonable assurance that: . . . . (2) The share of the estimated cost of decommissioning for each electric utility to which the plant supplies power is reasonable;

Maine Yankee has been collecting funds for the decommissioning trust fund in a *pro rata* manner among

all of its customers pursuant to the Interim Plan and current FERC rates, and requested in this proceeding that it be permitted to continue to collect in that manner. In our February 22 Order, we found Maine Yankee's proposed plan for the *pro rata* sharing of decommissioning costs among customers based on the amount of output to be reasonable. That is, the division of decommissioning costs to the extent that they are already recognized by the FERC in rates, is reasonable pursuant to 35-A M.R.S.A. § 4353(3)(B)(2). We did not order Maine Yankee to collect the difference between the amount we ordered Maine Yankee to pay into the Trust Fund annually and the amount FERC currently reflects in rates from *customers,* because a change in amount from customers must be made by FERC. The additional amount we ordered into the Trust Fund must come from Maine Yankee, essentially from shareholders or sponsors, until such time as the FERC allows these costs to be collected in rates. The share for the additional amount should be divided among shareholders according to percent ownership. We find this to be a reasonable arrangement given the limitations on our ratemaking authority over Maine Yankee. When the increased decommissioning costs now imposed by the State of Maine are fully reflected in Maine Yankee's wholesale rates, we would find reasonable the *pro rata* division of costs among all of Maine Yankee's customers, shareholder and non-shareholder alike.

Turning to the Motion by Maine Yankee for a Stay of certain sections of our Order, we note the current predicament of Maine Yankee caused by the February 22, 1990 Order and a FERC Order approving a stipulation whereby Maine Yankee agreed to not request a change in

rates at FERC that would be effective before February 16, 1991. Maine Yankee argues that our February 22 Order is not a sufficient force majeure circumstance that would allow it to file for a change in rates at FERC before the stay-out date. We do not know whether that assertion is true. Meanwhile, however, the Company has indicated its intention of appealing our order to the Maine Supreme Judicial Court. Accordingly, we grant a stay of the second sentence of paragraph 3 on page 52 of our February 22 Order and paragraph 4 on page 52 of our February 22 Order under the following conditions:

1. Maine Yankee must file an appeal for judicial review of our Order to the Maine Supreme Judicial Court within the time period for taking an appeal;

2. The stay shall be removed 10 days after a final decision by the Maine Supreme Judicial Court on the appeal taken by Maine Yankee concerning the validity or legality of our February 22 Order;

3. Regardless of condition number 2 immediately above, the stay shall be removed if FERC allows a change to Maine Yankee's rates which reflect the decommissioning costs imposed by our February 22 Order; and

4. If the Commission's Order of February 22 is judicially upheld, Maine Yankee must make the decommissioning trust fund whole, pursuant to the terms of our Order, retroactive to March 1, 1990. The exact terms upon which the trust fund will be made whole will be determined at that time.

Even during the pendency of the stay, Maine Yankee must of course continue to pay into the Trust Fund the

amounts that it is collecting from its customers pursuant to the current FERC rates.

Dated at Augusta, Maine this 23rd day of March, 1990.

BY ORDER OF THE COMMISSION

/s/ Charles A. Jacobs
Charles A. Jacobs
Administrative Director

(SEAL)

A true copy.
Attest: /s/ Charles A. Jacobs
Charles A. Jacobs
Administrative Director

COMMISSIONERS VOTING FOR: Gordon
Harrington
Paine

"This document has been designated for publication"

Concurring Statement of Chairman Gordon

Although I agree with the Order we are issuing here, I believe it would have been better, from both the practical administrative and fairness points of view, to extend the stay provision to the end of the FERC "stay-out" provision with Maine Yankee, subject of course to condition 3 of the Order.

NOTICE OF RIGHTS TO REVIEW OR APPEAL

5 M.R.S.A. § 9061 requires the Public Utilities Commission to give each party to an adjudicatory proceeding written notice of the party's rights to review or appeal of

its decision made at the conclusion of the adjudicatory proceeding. The methods of review or appeal of PUC decisions at the conclusion of an adjudicatory proceeding are as follows:

1. *Reconsideration* of the Commission's Order may be requested under Section 65(N) of the Commission's Rules of Practice and Procedure (65-407 C.M.R. 11) within 20 days of the date of the Order by filing a petition with the Commission stating the grounds upon which reconsideration is sought.

2. *Appeal of a final decision* of the Commission may be taken to the Law Court by filing, within 30 days of the date of the Order, a Notice of Appeal with the Administrative Director of the Commission, pursuant to 35-A M.R.S.A. § 1320(1)-(4) and the Maine Rules of Civil Procedure, Rule 73, et seq.

3. *Additional court review* of constitutional issues or issues involving the justness of reasonableness of rates may be had by the filing of an appeal with the Law Court, pursuant to 35-A M.R.S.A. § 1320(5).

NOTE The attachment of this Notice to a document does not indicate the Commission's view that the particular document may be subject to review or appeal. Similarly, the failure of the Commission to attach a copy of this Notice to a document does not indicate the Commission's view that the document is not subject to review or appeal.

APPENDIX G

44 FERC ¶61,368

Maine Yankee Atomic Power Company (represented by LeBoeuf, Lamb, Leiby & MacRae), Docket No. ER88-202-000

Letter Order.

(Issued September 20, 1988)

By Direction of the Commission: Lois D. Cashell, Acting Secretary.

On July 27, 1988, you filed a settlement agreement among Maine Yankee Atomic Power Company ("the Company"), the Public Advocate of the State of Maine, and the Municipal Customer Group in the above-referenced docket. The settlement is also applicable to the ten sponsoring utilities of Maine Yankee's nuclear power plant at Wiscasset, Maine.[1] On August 1, 1988, staff and the Public Advocate of the State of Maine submitted comments in support of the settlement. On August 4, 1988, the Company submitted reply comments in support of the settlement. No other comments were received. On August 5, 1988, the presiding administrative law judge certified the uncontested settlement to the Commission.

The subject settlement is in the public interest and is hereby approved. The settlement rates submitted with the

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[1] The ten sponsoring utilities are Central Maine Power Company, New England Power Company, Connecticut Light and Power Company, Bangor Hydro-Electric Company, Maine Public Service Company, Public Service Company of New Hampshire, Cambridge Electric Light Company, Montaup Electric Company, Western Massachusetts Electric Company, and Central Vermont Public Service Corporation.

settlement are accepted for filing and are designated and made effective as shown on the attached enclosure. The Commission's approval of this settlement does not constitute approval of, or precedent regarding, any principle or issue in this proceeding.

With regard to Article IV of the settlement agreement, the Commission expressly conditions its acceptance of the settlement upon Maine Yankee's inclusion in its tariff of the following equity return reopener clause:

> *Equity Return Reopener Clause*
>
> During the period from August 1-31 of 1989, and every August 1-31 thereafter, any purchaser under this Power Contract, any wholesale requirements customer affected by such Power Contract, any state regulatory commission having jurisdiction over the retail rates of purchasers affected by such Power Contract under this formula, any state consumer counsel of a state having jurisdiction over the retail rates of purchasers affected by such Power Contract under this formula, or any consumer advocate group representing consumers of a state having jurisdiction over the retail rates of purchasers affected by such Power Contract under this formula may file a motion to institute procedures under this equity reopener provision. The Federal Energy Regulatory Commission (Commission) may also institute proceedings under this provision during that time period. The Commission will publish in the *Federal Register* a notice of the motion, or its order to show cause if the Commission proceeds on its own motion, and will allow the company and any other affected party an opportunity to respond. If the Commission sets the equity return for investigation and

hearing under this provision, the following special procedures will apply:

(1) The only issue to be addressed will be the level of the return on equity;

(2) The burden of going forward will be on the party advocating the lower return on equity;

(3) If the return on equity is ultimately determined to be unjust and unreasonable, refunds under 18 C.F.R. § 35.19a will be due, dating back to the later of: (a) 60 days from the date of the motion was filed; or (b) the date of the Commission order setting the matter for investigation and hearing.

(4) If the Commission, or a court on review of the Commission's Opinion No. 285, either orders that the provision required in Opinion No. 285 shall not be required of the other three Yankee companies,[2] or modifies the type of provision that can be required of the other three Yankee companies, Maine Yankee shall, within 15 days from the date of such triggering order, make a FERC compliance filing which conforms its equity reopener clause (including the deletion thereof, if that triggering order provides for deletion) to the triggering order. Maine Yankee will request that such compliance filing be made effective as of the date of such filing (and no party to Docket No. ER88-202 will oppose such request).

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[2] The "other three Yankee companies" are Connecticut Yankee Atomic Power Company, Vermont Yankee Nuclear Power Corporation, and Yankee Electric Power Company.

(5) If Section 206 of the Federal Power Act is amended to provide for any customer rate refund relief, such equity reopener provision shall be deleted from Maine Yankee's filed tariff. Within 15 days from the signing into law of any such legislation, Maine Yankee shall make a compliance filing deleting such equity reopener provision, and request that such deletion shall be made effective by the Commission as of the date such legislation becomes effective. No party hereto will oppose such request.

Additionally, with regard to Article V of the settlement agreement, the Commission expressly conditions its acceptance of the settlement upon Maine Yankee's inclusion in its tariff of the following provision:

Unit License Life Clause

(1) Within 30 days after the date of a Nuclear Regulatory Commission (NRC) order changing the operating license expiration date for Maine Yankee's nuclear unit at Wiscasset, Maine ("the Unit"), Maine Yankee will, by compliance filing with the FERC, make conforming adjustments to its: (a) depreciation charges; (b) last core nuclear fuel amortization; (c) materials and supplies amortization; and (d) any other amortization or other charges that are based upon or tied to the Unit's useful plant life.

The allowable cost recovery for each of these foregoing items will be calculated on the basis of the most recent NRC-authorized license life. Maine Yankee is further directed to ensure that each such compliance filing will request from

the Commission an effective date which falls within 30 days of the NRC order.

(2) Within 90 days from the date of any such NRC order changing the operating license expiration date for the Unit, Maine Yankee will file pursuant to Section 205 of the Federal Power Act to show: (a) whether, and to what extent, Maine Yankee believes it appropriate to modify the term of its decommissioning collections and its associated annual decommissioning charges; and (b) if Maine Yankee believes no such change is warranted, the justification therefor; provided, however, that Maine Yankee will request in such filing (and no party hereto will oppose such request) that any final determination with respect to the level of decommissioning charges to be imposed as a result of the proceeding arising out of such filing be made effective as of the date of such filing, and refunds, if any, relating thereto accrue as of the date of such filing.

Within thirty (30) days from the date of this letter Maine Yankee shall file amendments to its tariff which incorporate the Equity Return Reopener and Unit License Life clauses herein ordered. Also within thirty (30) days from the date of this letter any amounts collected in excess of the settlement rate levels shall be refunded together with interest computed under Section 35.19a of the Commission's Regulations. Within fifteen (15) days after making such refunds, the Company shall file with this Commission a compliance report showing monthly billing determinants, revenue receipt dates, and revenues under the prior, present and settlement rates, the monthly revenue refund, and the monthly interest computed, together with a summary of such information for the total

refund period. The Company shall furnish copies of such report to the affected wholesale customers and to each state commission within whose jurisdiction the wholesale customers distribute and sell electric energy at retail.

This letter terminates Docket No. ER88-202-000. A new sub-docket will be assigned in ER88-202 upon receipt of the required compliance refund report.

Enclosure

Rate Schedule Designations

Filing Date: July 27, 1988
Effective Date: August 16, 1988

Designation – Description

(1) Supplement No. 13 to Rate Schedule FPC No. 1 – Settlement Agreement with participating intervenors

(2) Supplement No. 1 to Supplement No. 13 to Rate Schedule FPC No. 1 (Supersedes Supplement No. 11 to Rate Schedule FPC No. 1) – Reduction in Rate of Return on common equity to 12.9%

(3) Supplement No. 2 to Supplement No. 13 to Rate Schedule FPC No. 1 (Supersedes Supplement No. 12 to Rate Schedule PFC No. 1) – Nuclear plant decommissioning expenses

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Maine Yankee Atomic Power Company
Docket No. ER88-202-000

Before: The Honorable Max L. Kane,
Presiding Administrative Law Judge

SETTLEMENT AGREEMENT

July 27, 1988

* * *

ARTICLE I

SCOPE OF SETTLEMENT

This Settlement resolves all issues raised in pleadings, prefiled testimony, and any Commission order in Docket No. ER88-202-000. To the extent not otherwise expressly addressed in this Settlement, the rates charged by Maine Yankee effective August 16, 1988, shall be consistent with the January 15, 1988 Maine Yankee rate application, as amended by the April 14, 1988 compliance filing in this docket.

ARTICLE II

SETTLEMENT BILLING PROVISIONS

For service on and after August 16, 1988, until any further order of the Commission modifying Maine Yankee's rates, and subject to Articles III and V hereof, Maine Yankee shall reflect the following cost-of-service values in calculating billings pursuant to Section 7 of the Power Contract and the associated formula rate specification submitted pursuant to Article VI hereof:

1. Rate of Return on Common Equity – In computing the "composite percentage" return on the net Unit investment, Maine Yankee shall use a common equity rate of return of twelve point nine percent (12.9%).

2. Amortization of Materials and Supplies and Last Core Nuclear Fuel – Maine Yankee shall incorporate into its billing calculation amounts for amortization of materials and supplies and last core nuclear fuel as proposed in its January 15, 1988 rate application in this case; *provided*, however, that if and to the extent that Maine Yankee realizes any net salvage value for materials and supplies at the end of the Unit's service life, Maine Yankee shall provide a rate credit to its wholesale customers to reflect such net salvage value. Maine Yankee will prorate such credits, as appropriate, among such customers to reflect the extent to which such customers paid rates reflecting amortization of materials and supplies. At the time that such rate credit is provided, Maine Yankee will make an informational filing with the Commission (which shall not be deemed a filing pursuant to Section 205 of the Federal Power Act) to show the amount of the credits and the calculation thereof.

3. Depreciation – Maine Yankee shall use the methodology set forth in the January 15, 1988 rate application in this case for computing depreciation expense.

4. Decommissioning Expense – Maine Yankee shall collect $9,073,943 annually for decommissioning expense, exclusive of any income tax liability. The underlying assumptions that the parties have relied upon in reaching this agreement with respect to such expense are set forth in Appendix A. The annual decommissioning charges,

based on this amount, for each Sponsor and Secondary Purchaser are set forth in Appendix B hereto. Maine Yankee shall, each year, provide to the counsel for active parties to this proceeding an annual report setting forth the investment philosophy and performance for the decommissioning trust fund.

ARTICLE III
DECOMMISSIONING EXPENSE MORATORIUM

1. The parties hereby agree that, subject to the *proviso* set forth below, and notwithstanding the provisions of Article V, Maine Yankee shall not make a filing to place into effect prior to February 16, 1991, any increase in the level of annual decommissioning charges above that stated in Article II, Paragraph 4; *provided*, however, that the foregoing sentence shall not apply if, during the period that this Article would otherwise apply, a referendum or legislation is passed, or regulatory action is taken, which requires the Unit to shut down permanently prior to 2008. Nothing in the *proviso* in the foregoing sentence shall be construed as affecting the rights of any customer of Maine Yankee to protest or otherwise exercise its full rights to contest any filing made by Maine Yankee pursuant to the *proviso* stated in the foregoing sentence.

2. No filing shall be made by a party under Section 206 seeking a decrease in such annual decommissioning charges to be effective prior to February 16, 1991, unless Maine Yankee files to change the level stated in Article II, Paragraph 4.

* * *

Maine Yankee Atomic Power Company
Supplement No. ___ to Rate Schedule
FPC No. 1

In computing the "composite percentage" return on the net Unit investment, Maine Yankee shall use a common equity rate of return of 12.9% per annum.

* * *

Maine Yankee Atomic Power Company

Supplement No. ___ to Rate Schedule FPC No. 1

Line No.	Utilities	Entitlement	Decommissioning
1	Bangor Hydro-Electric Company	6.8986%	$ 626,084
2	Central Maine Power Company	37.4560%	3,398,738
3	New England Power Company	17.9607%	1,629,744
4	Public Service Company of New Hampshire	4.4902%	407,438
5	Central Vermont Public Service Corporation	1.7861%	162,977
6	Montaup Electric Company	3.5821%	325,945
7	Cambridge Electric Light Company	3.5921%	325,945
8	Connecticut Light and Power Company	10.3058%	935,142
9	Western Massachusetts Electric Company	2.6941%	244,461
10	Maine Public Service Company	4.9284%	447,200
11	Eastern Maine Electric Cooperative, Inc.	0.3085%	27,993

Line No.	Utilities	Entitlement	Decommissioning
12	Houlton (to Maine Public Service Company)	0.4073%	36,958
13	Ashburahas	0.0223%	2,023
14	Boylston	0.0202%	1,833
15	Braintree	0.4037%	36,622
16	Chicopee	0.4761%	43,201
17	Danvers	0.2360%	21,415
18	Georgetown	0.0315%	2,858
19	Hingham	0.1524%	13,829
20	Holyoke	0.3474%	31,523
21	Hudson	0.1487%	13,493
22	Hull	0.0569%	5,163
23	Ipswich	0.1141%	10,353
24	Littleton	0.0648%	5,880
25	Marblehead	0.1433%	13,003
26	Middleborough	0.1182%	10,725
27	Middleton	0.0392%	3,557
28	North Attleborough	0.1588%	14,391
29	Paxton	0.0288%	2,613
30	Peabody	0.3706%	33,628
31	Shrewsbury	0.2126%	19,291
32	Sterling	0.0263%	2,866
33	Taunton	0.5337%	48,428
34	Templeton	0.0307%	2,786
35	Wakefield	0.1835%	17,558
36	West Boylston	0.0574%	5,208
37	Westfield	0.2854%	25,897
38	Wolfsboro (to Holyoke)	0.0903%	8,194
39	New Hampshire Electric Cooperative	0.7358%	66,748
40	Conn. Municipal Electric Energy Cooperative	0.4706%	42,702
41	Total Revenues	100.0000%	$ 9,073,943

APPENDIX H

MAINE YANKEE ATOMIC POWER COMPANY

v.

MAINE PUBLIC UTILITIES COMMISSION.

Supreme Judicial Court of Maine.

Argued Sept. 18, 1990.
Decided Oct. 25, 1990.

* * *

Before ROBERTS, WATHEN, GLASSMAN, CLIFFORD, COLLINS, and BRODY, JJ.

WATHEN, Justice.

Maine Yankee Atomic Power Company ("Maine Yankee") appeals the February 22, 1990 order of the Maine Public Utilities Commission ("MPUC") purporting to establish Maine Yankee's cost of decommissioning and to fix the amounts which Maine Yankee must pay annually to its decommissioning trust fund, pursuant to Maine's Nuclear Decommissioning Financing Act ("NDFA"), 35-A M.R.S.A. §§ 4351-4359 (1988).

At the heart of this appeal lies a jurisdictional issue. Maine Yankee maintains that a federal agency, the Nuclear Regulatory Commission ("NRC"), has exclusive jurisdiction over nuclear decommissioning which it exercises in conjunction with the ratemaking agency, the Federal Energy Regulatory Commission ("FERC"). The MPUC, however, asserts that it has concurrent jurisdiction to review and approve any proposed decommissioning financing plan, pursuant to the NDFA. We determine that federal law preempts the NDFA.

Maine Yankee, a licensed nuclear electric generating facility in Wiscasset, is owned by a group of investor-owned electric utilities ("the sponsors") located in Maine, Massachusetts, New Hampshire, Connecticut, and Vermont. Maine Yankee sells to these sponsors, at wholesale, its entire output of electricity on a basis proportional to each sponsor's ownership of the company.

Pursuant to the Atomic Energy Act of 1954, as amended, and the Energy Reorganization Act of 1974, as amended, the NRC is statutorily mandated "to protect the radiological health and safety of the public." General Requirements for Decommissioning Nuclear Facilities, 53 Fed.Reg. 24018, 24037 (1988). In keeping with this mandate, the NRC promulgated a rule requiring

> reasonable assurance that at the time of the termination of operations [of nuclear facilities] adequate funds are available so that decommissioning can be carried out in a safe and timely manner and that lack of funds does not result in delays that may cause potential health and safety problems.

Id. On July 27, 1988, the NRC's general requirements for decommissioning nuclear facilities became effective. *Id.* at 24018-19.

Although the NRC is not authorized to regulate rates or to interfere with the decisions of state or federal agencies respecting the economics of nuclear power, the NRC is responsible for promulgating "rules prescribing allowable funding methods for meeting decommissioning costs." *Id.* at 24037 (citing *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm.*, 461 U.S. 190, 212-13, 217-19, 103 S.Ct. 1713, 1726-27, 1729-30, 75 L.Ed.2d 752 (1983)). In setting forth technical and

financial criteria for decommissioning licensed nuclear facilities, the NRC took care to clarify the roles of the state public utility commissions and the Federal Energy Regulatory Commission. To FERC the NRC ascribes

> the responsibility for setting rates for the *transmission and sale (wholesale) of electricity by investor-owned utilities in interstate commerce* and authorizes the conditions, rates, and charges for interconnections among electric utilities. . . . State public utility commissions have the responsibility for setting rates for *retail* sales of electricity to homeowners and companies doing business in their states.

53 Fed.Reg. at 24037-38 (emphasis added). As a company engaged in the "transmission and sale (wholesale) of electricity by investor-owned utilities in interstate commerce," Maine Yankee is subject only to the jurisdiction of FERC for the regulation of its utility service and rates. The rates fixed by FERC provide for the costs of operating the plant as well as a return through depreciation of Maine Yankee's investment in the plant. Thus, Maine Yankee asserts that FERC has jurisdiction over its decommissioning plan since "decommissioning expenses have historically been and continue to be treated by FERC as depreciation and booked as negative salvage."

On October 5, 1981, Maine Yankee made a rate increase filing with FERC, seeking "to reflect in its rates the estimated costs of decommissioning" its nuclear generating plant. *Maine Yankee Atomic Power Co.*, 20 F.E.R.C. ¶ 61,141 at p. 61,308 (1982). On October 29, 1981, the MPUC filed a notice of intervention with FERC and took the position that Maine Yankee should "supplement or modify its filing with a 'rate schedule' which provides for

(1) the billing of decommissioning costs in accordance with the method approved by the M.P.U.C. . . . and (2) the segregation of decommissioning funds in a separate account to be used solely for decommissioning purposes." On March 30, 1982, Maine Yankee filed a proposed settlement agreement which attempted to resolve the issues in the subsequent FERC proceeding. *Id.* Meanwhile, on April 15, 1982, the Maine Legislature enacted the Nuclear Decommissioning Financing Act, now codified at 35-A M.R.S.A. §§ 4351-4359 (1988). The NDFA creates a specific mechanism for establishing a decommissioning financing plan and requires any licensee operating a nuclear power plant in Maine to file a proposed plan with the MPUC for review and ultimate approval. *Id.* at § 4353(1-3).

On August 3, 1982, FERC issued its order approving the March 30, 1982 settlement agreement and expressing the view, with regard to the NDFA, that there should be "consistency with the states . . . to the extent that it allows us to properly carry out our duties under the Federal Power Act." *Maine Yankee Atomic Power Co.*, 20 F.E.R.C. at p. 61,310. The MPUC did not appeal this order. Since that time, Maine Yankee and the other parties to this litigation, including the MPUC, have participated in litigated FERC proceedings in 1985 and 1988. *Maine Yankee Atomic Power Co.*, 31 F.E.R.C. ¶ 61,068 (1985); *Maine Yankee Atomic Power Co.*, 44 F.E.R.C. ¶ 61,368 (1988). In each of these cases, the parties negotiated the appropriate cost estimate and funding level for decommissioning expenses and reached a binding settlement; no appeals were taken.

On September 13, 1982, Maine Yankee filed its proposed decommissioning financing plan with the MPUC;

on November 12, 1982, the MPUC notified the company that its filing was incomplete; and on December 7, 1982, the MPUC granted Maine Yankee's request for additional time to supplement its filing. Since then, both parties continued to process the case, but no final plan was ever approved by the MPUC. On August 29, 1983, the MPUC approved a stipulation entered into by the parties as an interim decommissioning financing plan.

On January 15, 1988, Maine Yankee petitioned FERC to modify the period over which it would collect decommissioning costs to 10 years, increase its annual decommissioning charges accordingly, the decrease the level of return on common equity that the company could collect. *Maine Yankee Atomic Power Co.*, 42 F.E.R.C. ¶ 61,307 at p. 61,920 (1988). According to Maine Yankee, these changes "would have permitted the company to fix decommissioning expense based on Maine Yankee's most recent estimate of $178,097,900 and to fund for decommissioning expense at the level of $14,466,467 per year over the course of ten years." On February 8, 1988, the MPUC filed an intervention, making it a party to the proceeding. *Id.* In its March 15, 1988 order, FERC rejected Maine Yankee's proposed accelerated decommissioning schedule and required the company to "file revised rates, reflecting recovery of decommissioning costs over the nuclear unit's remaining life." *Id.* at p. 61,923.

On July 27, 1988, Maine Yankee submitted an uncontested settlement agreement which FERC approved on September 20, 1988, establishing a decommissioning cost basis of $167,000,000 and a fixed rate of return on common equity at 12.9%. *Maine Yankee Atomic Power Co.*, 44 F.E.R.C. ¶ 61,368 at p. 62,224 (1988). In addition, the

parties agreed to a "stay-out" provision prohibiting Maine Yankee from making "a filing to place into effect prior to February 16, 1991, any increase in the level of annual decommissioning charges above that stated in [the settlement agreement]."

On March 20, 1989, Maine Yankee moved that the MPUC approve an amendment to the August 29, 1982 interim decommissioning financing plan which reflected the provisions of the September 20, 1988 FERC order, converting it into an MPUC approved, decommissioning finance plan. On November 17, 1989, hearings began on the issue, and, on November 29, 1989, Maine Yankee, the Public Advocate, and the Industrial Energy Consumer Group ("IECG")[1] filed a stipulation of the issues in the case. On February 22, 1990, the MPUC rejected the stipulation and Maine Yankee's decommissioning financing plan, finding that "$178,097,900 is the most reasonable estimated cost of decommissioning," and ordered that Maine Yankee increase, effective March 1, 1990, its annual contributions to the decommissioning trust fund by $719,961, for a total contribution of $9,793,904.

On March 23, 1990, the MPUC stated that additional funding amounts required under its February 22, 1990 order must be supplied from Maine Yankee's assets or the assets of the sponsors, and granted a request to stay the

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[1] The Industrial Energy Consumer Group ("IECG") is an incorporated association of large industrial consumers of energy located within the State of Maine. Its members are Champion International, International Paper Company, Keyes Fibre Company, United Timber Corporation, Cyro Industries, the Maine Textile Council, Boise Cascade Corporation, Forester Manufacturing Company and James River Corporation. A petition to intervene was filed by this group on May 24, 1989, and subsequently granted.

February 22, 1990 order pending Maine Yankee's appeal to this Court.

The supremacy clause of the United States Constitution provides that the law of the United States "shall be the supreme Law of the Land. . . . " U.S. Const. Art. VI, cl. 2. Thus, under certain circumstances, federal law will preempt even validly enacted state law. In the recent case of *Cent. Maine Power Co. v. Town of Lebanon*, 571 A.2d 1189 (Me.1990), we reiterated the principles of preemption:

> "Preemption occurs when Congress, in enacting a federal statute, expresses a clear intent to preempt state law, when there is an outright or actual conflict between federal and state law, where compliance with both federal and state law is in effect physically impossible, where there is implicit in federal law a barrier to state regulation, where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law, or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress."

Id. at 1191 (quoting *Louisiana Public Service Comm. v. F.C.C.*, 476 U.S. 355, 368-69, 106 S.Ct. 1890, 1898-99, 90 L.Ed.2d 369 (1986) (citations omitted)). The exercise of federal supremacy should not be presumed lightly. *Cent. Maine Power Co. v. Town of Lebanon*, 571 A.2d at 1191. Nevertheless, when no other conclusion is possible given the nature of the regulated subject matter, or Congress has clearly ordained this result, federal law must preempt conflicting state law. *Director of Bureau of Labor Standards v. Fort Halifax Packing Co.*, 510 A.2d 1054, 1057 (Me.1986).

Preemption occurs whenever state law conflicts with federal law in such a way that it becomes impossible to comply with both simultaneously. *California v. F.E.R.C.*, ___ U.S. ___, 110 S.Ct. 2024, 109 L.Ed.2d 474 (S.Ct.1990) (quoting *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248, 104 S.Ct. 615, 621, 78 L.Ed.2d 443 (1984)); *see also Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 108 S.Ct. 1145, 1150-51, 99 L.Ed.2d 316 (1988). Such a conflict "may be direct, in that the state regulation obviously contradicts federal regulation, or it may arise from Congressional intent, either express or implied, to occupy a particular area." *Director of Bureau of Labor Standards v. Fort Halifax Packing Co.*, 510 A.2d at 1057. Courts must first ascertain the objectives of Congress before determining whether a state statute hinders the achievement of federal policy. *Bayside Enter. v. Maine Agricultural Bargaining Bd.*, 513 A.2d 1355, 1358 (Me.1986).

A federal agency acting within the scope of its congressionally delegated authority may also preempt state regulation. *Louisiana Pub. Serv. Comm. v. F.C.C.*, 476 U.S. at 369, 106 S.Ct. at 1898-99; *see also Fidelity Fed. Sav. and Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153, 102 S.Ct. 3014, 3022, 73 L.Ed.2d 664 (1982) ("Federal regulations have no less pre-emptive effect than federal statutes.") Thus, if the NRC and FERC are acting within the scope of their congressionally delegated authority in asserting exclusive jurisdiction over Maine Yankee's decommissioning plan, the MPUC order and the NDFA are preempted.

Maine Yankee claims that the MPUC order and the NDFA should be preempted because (1) they interfere impermissibly with FERC's jurisdiction over wholesale

rates and (2) they intrude on a field which has been pervasively and exclusively regulated by Congress.

1. *Impermissible interference with FERC's jurisdiction*

It is undisputed that FERC has jurisdiction for setting rates for "the transmission and sale (wholesale) of electricity by investor-owned utilities in interstate commerce." 53 Fed.Reg. at 24037-38; *see also Mississippi Power & Light Co. v. Moore*, 487 U.S. 354, 108 S.Ct. 2428, 2439, 101 L.Ed.2d 322 (1988) ("FERC has exclusive authority to determine the reasonableness of wholesale rates."). Maine Yankee argues that the MPUC order directly conflicts with the valid exercise of this ratemaking jurisdiction in several significant respects.

FERC's March 15, 1988 rate order included four specific components of Maine Yankee's costs of service: 1) the rate of return on common equity; 2) amortization of materials and supplies and last core nuclear fuel; 3) decommissioning expense; and 4) other depreciation. The MPUC order, retroactive to March 1, 1990, alters the effect of this order, fixing Maine Yankee's decommissioning expense at $719,961 more per year than the March 15, 1988 FERC order and providing for Maine Yankee's sponsors a lower rate of return.

The decommissioning funding level is a stated amount which cannot vary without FERC approval. *Cent. Vermont Pub. Serv. Corp.*, 44 F.E.R.C. ¶ 61,278 at p. 62,027 (1988); *see also Yankee Atomic Electric Co.*, 30 F.E.R.C. ¶ 61,111, at p. 61,202 (1985). It is one cost of service component which contributes to the establishment of

Maine Yankee's utility rate. Under the "filed rate doctrine" developed under federal law, a federally regulated utility is precluded from collecting any rate other than that of file with the Commission, and the MPUC cannot interfere with the rate set by FERC or the components that go into it. *Nantahala Power and Light Co. v. Thornburg*, 476 U.S. 953, 963, 106 S.Ct. 2349, 2355, 90 L.Ed.2d 943 (1986); *see also Mississippi Power & Light Co. v. Moore*, 108 S.Ct. at 2438-39.

FERC has held that decommissioning expense, like depreciation, should be collected from ratepayers as a cost of service. *Indiana and Michigan Mun. Distrib. Ass'n v. Indiana Michigan Power Co.*, 49 F.E.R.C. ¶ 63,020 at p. 65,084 (1989); *Middle South Energy, Inc.*, 31 F.E.R.C. ¶ 61,305 at p. 61,658 (1985). Pursuant to the "stay-out" provision in the March 15, 1988 FERC order, however, Maine Yankee cannot file for a rate increase that would become effective prior to February 16, 1991. Thus, the company is prevented from raising the revenues necessary to meet the demands of the MPUC order retroactive to March 1, 1990, by FERC's requirement that decommissioning costs come from ratepayers and Maine Yankee's agreement to delay any rate increase until after February 16, 1991. Given this scenario, it is impossible for Maine Yankee to comply with both the March 15, 1988 FERC order and the February 22, 1990 MPUC order. Applying the principles of preemption set forth earlier, the MPUC order is preempted.

Contrary to FERC policy, the MPUC has directed Maine Yankee to raise revenues from the company's own assets and the assets of its sponsors. FERC fixed the rate of return for Maine Yankee's sponsors at 12.9% in the

March 15, 1988 order. In requiring that additional funding for decommissioning come from the assets of Maine Yankee and its sponsors, the MPUC is impermissibly mandating a reduction in the sponsors' rate of return and weakening the company's financial base. The MPUC has no authority to require a reduction in a component of Maine Yankee's rates, set exclusively by FERC. Any attempt to do so is preempted by FERC. *See Safe Harbor Water Power Corp. v. Fed. Power Comm.*, 179 F.2d 179, 201 (3rd Cir.1949) ("The amount of rate of return is preeminently a question for determination by the Commission."[2]); *F.P.C. v. Hope Natural Gas Co.*, 320 U.S. 591, 605, 64 S.Ct. 281, 289, 88 L.Ed. 333 (1944) (Setting valid rates enables a company "to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risks assumed.").

Without merit is the MPUC's assertion that its order does not interfere with rate setting, but, like a state income tax, merely affects Maine Yankee's rates indirectly. The United States Supreme Court has held that "the filed rate doctrine is not limited to 'rates' *per se*." *Nantahala v. Thornburg*, 476 U.S. at 966, 106 S.Ct. at 2357. In *Mississippi Power & Light Co. v. Moore*, the Court stated that FERC's exclusive jurisdiction applies not only to rates, but to the components that affect wholesale rates. *Mississippi Power & Light Co. v. Moore*, 108 S.Ct. at 2439 ("FERC's exclusive jurisdiction applies not only to rates,

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[2] The Federal Power Commission ("FPC") was FERC's predecessor as a ratemaking agency. Responsibility for the establishment, review, and enforcement of rates and charges for the transmission or sale of electric energy was transferred from the FPC to FERC by 42 U.S.C. §§ 7172(a)(1)(B), 7293 (1983).

but also to power allocations that affect wholesale rates.") While in that case the component at issue was power allocations, the principle applies equally well to decommissioning financing. Both directly affect the calculation of reasonable wholesale rates over which FERC exercises exclusive jurisdiction. Furthermore, the impact of the decommissioning financing plan imposed by the MPUC cannot validly be compared to the impact of a state tax. State taxes are not set by the federal government while Maine Yankee's decommissioning expenses are and have been set by FERC.

Thus, the MPUC order and the NDFA interfere impermissibly with FERC's exclusive jurisdiction over wholesale rates and are preempted by the supremacy clause of the United States Constitution.

2. *Intrusion on a field which has been pervasively and exclusively regulated by Congress*

When Congress has manifested an intent to occupy a particular area through a comprehensive scheme of federal regulation, federal law will preempt state regulation in that area. Congressional intent to occupy an area of law

> may be inferred where the pervasiveness of the federal regulation precludes supplementation by the States, where the federal interest in the field is sufficiently dominant, or where "the object sought to be obtained by the federal law and the character of obligations imposed by it . . . reveal the same purpose." . . . [E]ven where Congress has not entirely displaced state regulation in a particular field, state law is

> pre-empted when it actually conflicts with federal law.

Schneidewind v. ANR Pipeline Co., 108 S.Ct. at 1150 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947)).

In *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Dev. Comm.*, 461 U.S. 190, 103 S.Ct. 1713, 75 L.Ed.2d 752 (1983), the Supreme Court made it clear that state regulation of nuclear power is preempted when its purpose is to regulate safety, even when it does not directly conflict with federal law, because "the Federal Government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the States." *Id.* at 212, 103 S.Ct. at 1726. Since the passage of the Atomic Energy Act in 1954, Congress has preserved a dual system of regulation, with the federal government maintaining "complete control of the safety and 'nuclear' aspects of energy generation" and "the states exercising traditional authority over the need for additional generating capacity, the type of generating facilities to be licensed, land use, [retail] ratemaking, and the like." *Id.*

Maine Yankee argues that "federal law governs nuclear decommissioning chiefly through three interrelated regulatory schemes:" (1) Nuclear Regulatory Commission regulations; (2) certain provisions of the Federal Power Act; (3) section 468A of the Internal Revenue Code.

The MPUC concedes that the NRC has exclusive control over the health and safety aspects of nuclear decommissioning. It disputes, however, the validity of Maine

Yankee's assertion that NRC's jurisdiction extends to the economics of decommissioning.

Economic regulation of nuclear power has traditionally been granted to the states. *Id.* Nevertheless, the NRC has acknowledged its authority, granted by the Atomic Energy Act of 1954, as amended, and the Energy Reorganization Act of 1974, as amended, to

> take whatever regulatory actions may be necessary to protect the public health and safety, including the promulgation of rules prescribing allowable funding methods for meeting decommissioning costs. The fact that these regulatory actions may have an economic impact does not mean that they lie outside NRC's jurisdiction.

53 Fed.Reg. at 24037 (citations omitted). NRC's rule amendments permit the appropriate state or federal rate-setting agency to regulate funding for decommissioning; in the case of *wholesale* rate setting, that agency would be FERC. *Id.* at 24037-38.

The Federal Power Act, 16 U.S.C. §§ 824-825, declares that there will be federal regulation "of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce," provided this regulation extends "only to those matters which are not subject to regulation by the States." *Id.* at § 824(a). In this case, the decommissioning of an atomic power plant engaged in the wholesale marketing of electricity in interstate commerce is not matter subject to regulation by the state. Thus, by the authority of the Federal Power Act, state regulation must be preempted in this area.

It is undisputed that FERC requires utilities over which it exercises jurisdiction to follow I.R.C. § 468A (1988) which permits deductibility of amounts contributed to the decommissioning trust fund only to the extent such expense is included in rates. Maine Yankee contends that FERC's incorporation of IRC § 468A into the FERC regulatory scheme, as occurred in *Systems Energy Resources, Inc.*, 37 F.E.R.C. 61,261 at p. 61,726-27 (1986) ("SERI") "shows that the IRS regulations are not only a direct federal oversight of decommissioning fund policy, but are also inextricably interwoven into FERC's exercise of its own jurisdiction." The MPUC disputes this contention, claiming that Maine Yankee has failed to show that this incorporation indicates that Congress has granted IRS federal oversight of decommissioning fund policy. In either case, this issue is not determinative as it has already been shown that Congress intended to dominate the field of nuclear safety concerns.

When "the object sought to be obtained by the federal law and the character of obligations imposed by it . . . reveal the same purpose" as those sought by state regulation, the state regulation is preempted. *Schneidewind v. ANR Pipeline Co.*, 108 S.Ct. at 1150 (citation omitted). In enacting the NDFA, the Legislature stated that "timely proper decommissioning of any nuclear power plant . . . is essential to protect public health, safety and the environment." 35-A M.R.S.A. at § 4351. Because Congress has clearly manifested an intent to maintain "complete control over the safety and 'nuclear' aspects of energy generation," the NDFA is preempted.

Pacific Gas & Electric Co. v. State Energy Resources Conservation & Dev. Comm., 461 U.S. at 212, 103 S.Ct. at 1726.

The entry is:

The February 22, 1990 order is vacated.

All concurring.

AMICUS

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CURIAE

RIEF

FILED
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OFFICE OF THE CLERK

No. 90-1194

IN THE

Supreme Court of the United States

October Term, 1990

MAINE PUBLIC UTILITIES COMMISSION,
Petitioner,

v.

MAINE YANKEE ATOMIC POWER COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT COURT OF MAINE

BRIEF OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS AS *AMICUS CURIAE* SUPPORTING PETITION FOR CERTIORARI

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INTEREST OF AMICUS CURIAE

The National Association of Regulatory Utility Commissioners (NARUC) submits this brief as amicus curiae in support of the petition for writ of certiorari due to the substantial harm the decision below will have upon the regulation of public utilities

by its member State regulatory commissions. The NARUC files this brief with the written consent of the Petitioner and Respondent, which have been separately filed with the Clerk.

The NARUC is the national organization which represents the collective interest of the State regulatory utility commissions exercising jurisdiction over natural gas, electric and telephone utilities operating within their respective borders. The NARUC's member commissions, generally called "public service commissions" or "public utility commissions" (PSCs or PUCs), include the Maine Public Utilities Commission (MPUC), Petitioner in this case.

In the decision for which the MPUC seeks this Court's review, the Supreme Judicial Court of Maine (the Maine Court) held that Federal law preempted the authority of the MPUC to establish a decommissioning financing plan for the Maine

Yankee Atomic Power plant, a nuclear generating facility located in Wiscasset, Maine. Specifically, the Maine Court held that the MPUC's authority under Maine law -- the Nuclear Decommissioning Financing Act, 35-A M.R.S.A. secs. 4351-4359 (1988) ("NDFA") -- was preempted by the ratemaking authority of the Federal Energy Regulatory Commission (FERC).[1] By its decision, the Court below held, inter alia, that the MPUC's determination of the costs of Maine Yankee's nuclear decommissioning impermissibly interfered with the authority of the FERC to establish rates for the sale of wholesale power from the plant.

The decision below raises important issues for the State commission members of

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[1] The opinion of the Supreme Judicial Court of Maine (Petitioner's Appendix A) is reported at 581 A.2d 799 (Me. 1990). The unreported decision of the MPUC appears at Petitioner's Appendix B. The text of the NDFA appears at Petitioner's Appendix C. Subsequent reference will be made to these documents, as the appear in Petitioner's Appendix, in this form: App. at ____.

the NARUC. By holding that a State-determined cost of providing electric service is preempted by FERC regulation of wholesale power rates, the Maine Court has cast doubt on the decommissioning plans of other States, as well as other requirements that the States routinely impose on generating facilities located within their respective borders. In so doing, the Court has gone beyond this Court's decisions outlining the boundaries between Federal regulation of the rates for wholesale power sales and the continuing responsibilities of individual States to protect the health and well-being of their citizenry.

Accordingly, this case raises important issues, which should be addressed by this Court, concerning the manner in which State commissions and legislatures deal with electric utility facilities found within their respective borders. As the National representative of the State commissions, the

NARUC's interest in addressing these issues is strong, compelling its participation in this case.[2]

SUMMARY OF ARGUMENT

In reliance on a series of this Court's decisions concerning the relationship of State and Federal supervision of electric utility rates, the Supreme Judicial Court of Maine erroneously held that the MPUC was without jurisdiction under the NDFA to determine the appropriate level of costs for the decommissioning of Maine Yankee -- a nuclear power plant located within the State of Maine. The Court erred by refusing to analyze the MPUC's actions under this Court's holding in Pacific Gas & Electric v. State Energy Resources Conservation & Development Commission, 461 U.S. 190 (1983) ("Pacific Gas & Electric") wherein the Court

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[2] Consistent with this Court's Rule 37.1, the NARUC will not repeat the analysis of preemption doctrine contained in the Petition for Writ of Certiorari. The NARUC supports those arguments.

upheld the authority of the State of California to establish the economic conditions under which nuclear facilities may operate in that State.

One economic condition required by the State of Maine is that Maine Yankee, a nuclear facility located within the State, maintain sufficient funds in its decommissioning reserve accounts to ensure that at the end of the plant's useful life, there will be adequate monies available to fully return the plant site to a safe condition. As the MPUC notes in its petition, at least four other States have enacted statutes to specifically address this situation. Pet. at 8. By striking the MPUC's authority to require that its decommissioning order be obeyed, the Court below calls into question the authority of these States as well.

Additionally, the decision of the Court below threatens other types of costs that

States impose on utilities, such as State and local taxes or wage and labor rules or environmental and siting requirements, which are routinely factored into a utility's cost of service, and accordingly, affect both retail and wholesale power sales rates. Viewed in this light, the fundamental error of the decision below is the Court's confusion of State statutes and regulations which affect the cost of providing utility service, as in the case of the MPUC decommissioning decision, with a series of State commission decisions, struck down by this Court, which sought to prevent retail utilities from passing through wholesale power costs in retail rates.

ARGUMENT

THIS COURT SHOULD REVIEW THE RULING OF THE COURT BELOW THAT STATE REGULATION OF DECOMMISSIONING COSTS IS PREEMPTED BY FEDERAL REGULATION OF WHOLESALE UTILITY RATES

Power plants owned by electric

utilities sell their output to retail consumers and to other utility systems at wholesale. The rates at which wholesale power is marketed are regulated by the FERC under the Federal Power Act as amended, 16 U.S.C. sec. 791 et seq. (1988), even in the case of intrastate wholesale sales. Federal Power Commission v. Southern California Edison Co., 376 U.S. 205 (1964). Many power plants are operated to directly serve retail ratepayers under rates established by State regulators, but some, such as Maine Yankee, provide power exclusively at wholesale, and accordingly, rates for the sale of their output are subject to the jurisdiction of the FERC.[3]

However, even "wholesale" plants must be sited, constructed, operated and, in the case of nuclear facilities, decommissioned, all within the borders of a single State.

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[3] The MPUC does not contest the fact that Maine Yankee's rates are FERC jurisdictional. Pet. at 3

Accordingly, such plants have a presence in a given State which is no different than the presence of a retail generating facility. The plant consumes its fuel, water and air, employs its workers and occupies taxable real property all within the borders of a State whose public officials are vitally concerned that plant operations are conducted in the public interest, broadly defined. To ensure this result, these officials exercise the State's inherent police and taxing authorities to protect its citizenry from the economic and environmental impacts of such facilities.

In its decision in Pacific Gas & Electric, supra, this Court recognized the legitimate need of the States to address the economic aspects of nuclear power production. Despite Congress' enactment of the Atomic Energy Act of 1954, 42 U.S.C. secs. 2011 et seq. (1973), "the States exercise their traditional authority over

the need for additional generating capacity, the type of generating facilities to be licensed, land use, ratemaking, and the like." 461 U.S. at 212. Indeed, State authority over the economics of nuclear generation includes the power to "allow the development of nuclear power to be slowed or even stopped for economic reasons." 461 U.S. at 223.

Consistent with Pacific Gas & Electric, the State of Maine, through its enactment of the NDFA, has determined not that the development of nuclear power should be slowed or stopped, but rather, that the owners of a nuclear facility located in the State must ensure that adequate funds are available to decommission the plant at the end of its useful life. Were the plant providing power to be sold to retail ratepayers, such a State determination would be unexceptionable, indeed routine.

However, because the plant serves

wholesale consumers, the Court below determined that the MPUC was without jurisdiction to determine the appropriate level of Maine Yankee's decommissioning expenses. Relying on this Court's decisions in Mississippi Power & Light Co. v. Moore, 487 U.S. 354 (1988) and Nantahala Power and Light Co. v. Thornburg, 476 U.S. 953 (1986), the Court held, inter alia, that the MPUC's decommissioning order impermissibly interfered with FERC's wholesale ratemaking authority. App. at 9-12.

Both Mississippi and Nantahala involved instances in which States attempted to reallocate or adjust the quantity of wholesale power initially allocated to retail utilities by the FERC.[4] In each

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[4] In Mississippi, the State sought to reduce an FERC-determined allocation among utility retail affiliates of expensive power from the Grand Gulf nuclear facility. 487 U.S. at 373. In Nantahala, the State sought to increase an FERC-determined allocation of low-cost power, also between affiliated utilities. 476 U.S. at 954. In both cases, this Court held that the States lacked

case, the State, either through its regulatory commission or its courts, sought to reduce the rate impact on instate utilities of FERC rulings which determined the relative shares of wholesale power among affiliated utilities operating in more than one State. In response to these State rulings, the Court held that for purposes of determining retail rates of the utilities receiving an allocation of wholesale power, "[o]nce FERC sets such a [wholesale] rate, a State may not conclude in setting retail rates that the FERC-approved wholesale rates are unreasonable." Nantahala, 476 U.S. at 966. The sequence of events in these cases, as well as similar State court decisions cited in Nantahala, 476 U.S. at 965, involved efforts of State regulatory bodies to refuse to allow utilities to reflect in retail rates the costs of purchased power

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jurisdiction to "challenge the reasonableness of FERC's allocation." Mississippi, 487 U.S. at 374.

derived from wholesale rates previously determined to be "just and reasonable" by the FERC under the Federal Power Act.

The decision of the MPUC at issue in this case is fundamentally different. Here, in the interest of protecting its citizens from the potential local impacts of a nuclear plant without adequate decommissioning funding, the State commission imposed a cost on Maine Yankee, i.e. the cost of decommissioning the plant, that in turn becomes a component of the wholesale cost of service. Accordingly, the situation here is exactly the converse of the Mississippi/Nantahala fact pattern wherein the FERC-determined wholesale rate becomes a component of retail rates. Far from seeking to regulate the retail rate treatment of a FERC-determined wholesale rate as in Mississippi/Nantahala[5], the MPUC

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[5] See, App. at 48. "We [the MPUC] are not here setting an intrastate rate in conflict with a FERC-approved rate or

has simply established a minimum level of funding which it believes is necessary to ensure that the Maine Yankee site will be safely restored once it stops generating electricity.[6]

In its decision, the Court below failed to understand this distinction between a State decision to deny the passthrough of the costs of a wholesale rate (which may be

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declining to pass through to retail customers a FERC determined interstate rate or cost of service."

[6] Viewed in this light, the MPUC's decommissioning order differs in no material respect from a decision by a State environmental office which required a wholesale generating plant to install pollution control equipment, or reduce waste water discharges. In both cases, the State's directive will increase the plant's costs of providing wholesale power, thereby potentially affecting subsequent FERC rate determinations. The fact that FERC's last wholesale rate order did not factor these costs into rates does not mean that the State is forever foreclosed from imposing them. Yet, that is the apparent result that the decision of the Court below would establish.

preempted[7]) and State decisions which may establish one of the cost factors that FERC uses to determine the rate in the first instance. As evidence of this lack of understanding are the Maine Court's statements which hold that FERC and FERC alone can determine the cost inputs affecting wholesale rate levels. See, App. at 11-12, (". . . FERC's exclusive jurisdiction applies not only to rates, but to the components that affect rates.") Clearly, the FERC has jurisdiction under the Federal Power Act to determine the manner in which costs are reflected in wholesale

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[7] In dicta, the Court in Mississippi recognized that there may well be circumstances in which a State may have jurisdiction to affect a retail utility's passthrough of a wholesale rate. ". . . it might well be unreasonable for a utility to purchase unnecessary quantities of high-cost power, even if it had the legal right to refuse to buy that power." 487 at 373-4. There is no suggestion in the decision of the Court below that Maine Yankee is legally precluded from complying with the MPUC decommissioning order by the prior FERC ratemaking decision.

rates, but the costs themselves -- be they for labor, fuel, environmental compliance, or plant decommissioning -- are subject to a host of market and governmental forces far beyond the capability of FERC or any other commission to regulate. Therefore, the Maine Court's conclusion that FERC has jurisdiction to regulate cost inputs, both legally and practically, is error.

The Maine Court's confusion is no more apparent than in its discussion of FERC decisions which allocate shares of wholesale power costs among retail utilities. App. at 11. In Mississippi, this Court reasoned that FERC allocation decisions had the same preemptive effect as decisions actually setting a wholesale rate. 487 U.S. at 371. The preemptive effect of this holding, however, is to create retail costs which, under Mississippi, "are binding on the States." Id. But there is no suggestion in Mississippi or Nantahala that every State or

local government decision which may "affect" the wholesale costs of providing service is subject to FERC preemption.

Yet, that reading of Mississippi is the only logical result of the Maine Court's analysis. Because of its inability to distinguish wholesale costs from wholesale rates, that Court's holding expands the Mississippi/Nantahala line of cases far beyond the contours established by this Court. If followed in other jurisdictions, and applied to other types of State-determined "wholesale costs", the decision of the Court below will gravely restrict the ability of the States to ensure that the interest of the public is protected from the impacts of utility facilities.

Therefore, this Court should review the decision of the Maine Court to correct its flawed reading of the contours of State and Federal power in this regulatory arena. The MPUC's Petition should be granted.

CONCLUSION

The NARUC respectfully requests that the Petition for Certiorari be granted.

Respectfully submitted,

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